Office - Supreme Court, U.S.
FILED
NOV 10 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 562

CHARLES A. GIVENS

Petitioner

v.

C. A. MOULTON

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

CHARLES BRAGMAN
Counsel for Petitioner
Room 838 National Press Building
Washington 4, D. C.

Of Counsel
C. LENOIR THOMPSON
Bay Minette, Alabama.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

Subject Index

	PAGE
Reports of Opinions in Courts Below	1
Grounds on Which Jurisdiction of This Court Is Invoked	1-4
Questions Presented for Review	4-5
Statement of the Case	5-22
1. Facts of Case	5-8
2. Discussion of Errors	8-18
A. Res Adjudicata Doctrine	8-22
B. Writ of Error Coram Nobis	22-25

APPENDIX

Court Opinions	25-67
Documents	68-102
Statutes	102-105

TABLE OF CASES CITED

Anglo-California Trust Co. v. *Kelley* (1931), 4 P. 2d 604, 605, 117 Cal. App. 692	21
Bigler v. *Waller* (1782), 14 Wall 297, 307, 20 L.E. 891	16
Brinkerhoff-Faris Trust and Savings Co. v. *Hill* (1929), 281 U. S. 682, 50 S. Ct. 451, 74 L. E. 1107	21
Bronson v. *Schulten* (1882), 104 U. S. 410, 26 L. E. 797	25
Butler v. *Eaton* (1891), 141 U. S. 240, 242, 243, 11 S. Ct. 985, 35 L. E. 713	16
Dewey v. *Des Moines* (1899) 173 U. S. 193, 202, 203, 19 S. Ct. 379, 43 L. E. 665	17
First National Bank of Mobile v. *Burch* (1939), 188 So. 859, 867, 237 Ala. 680	17
Gagnon v. *U. S.* (1904), 193 U. S. 451, 24 S. Ct. 510, 48 L. E. 745	25

PAGE

Givens, Rose E., Administratrix, et al. v. *C. A. Moulton* (1956), 87 So. 2d 839 ..... 1, 2, 3, 8
Glover v. *McFaddin* (1951), 99 F. S. 385, 390, affirmed 205 F. 2d, 1, Certiorari Denied 346 U. S. 900, 74 S. Ct. 227, 98 L. E. 400, Rehearing Denied 346 U. S. 940, 74 St. Ct. 376, 98 L. E. 427 ..... 16, 17
The Grapeshot (1869), 7 Wall 563, 564, 19 L. E. 83 24
Johnson v. *Davis* (1912), 60 So. 799, 800, 180 Ala. 143 18
Kingsbury v. *Buckner* (1890), 134 U. S. 650, 669, 10 S. Ct. 646, 33 L. E. 1047 20
Ledbetter v. *Wesley* (1927), 23 F. 2d 81, 90, Certiorari Denied, 276 U. S. 631, 48 S. Ct. 324, 72 L. E. 741 16
McCorkle v. *Hamilton* (Texas Civic App.) (1941), 150 S. W. 2d 439, 442, Error Refused 17
McDonald v. *Mabee* (1917), 243 U. S. 90, 91, 37 S. Ct. 343, 61 L.E. 608 18
McQuillen v. *Dillon* (1938), 98 F. 2d 726, 729, Certiorari Denied 305 U. S. 655, 59 S. Ct. 251, 83 L. E. 424 18
Norville v. *Seeburg* (1920), 87 So. 164, 167, 205 Ala. 96 21
Owens v. *McCloskey* (Owens v. Henry) (1896), 161 U. S. 642, 645, 16 S. Ct. 693, 40 L. E. 837 18
Parker v. *Dacres* (1889), 130 U. S. 43, 48, 9 S. Ct. 433, 32 L. E. 848 22
People v. *Kemmitz* (1938), 15 N. E. 2d 883, 886, 296 Ill. Appeals 119 25
Potter v. *Foster* (1932), 64 S. W. 2d, 520, 523, 524, 16 Tenn. App. 336 17
Saunders v. *King* (1941), 37 N. E. 2d 92, 93, 63 Ohio Appeals 313 17
Seaboard Air Line Railroad Co. v. *Daniel* (1948), 333 U. S. 118, 122, 68 S. Co. 426, 92 L. E. 850 12
Shepherd v. *Ware* (1891), 48 N. W. 773, 774, 46 Minn. 174 17

PAGE

Simmon v. *Southern RR Co.* (1915), 236 U. S. 115, 122, 35 S. Ct. 255, 59 L. E. 492 21

W. T. Smith Lumber Co. v. *Barnes* (1953 Ala.), 66 So. 2d 77, 81 21

State ex rel Emmert v. *Gentry* (1945), 61 N. E. 2d 182, 183, 184, 223 Ind. 418, 159 A.L.R. 127 25

State ex rel Emmert v. *Gentry* (1945), 62 N. E. 2d, 860, 862, 223 Ind. 535, 161 A.L.R. 532 25

State of Texas v. *Chuoke* (1946), 154 F. 2d 1, 2, Certiorari Denied 329 U. S. 714, 67 S. Ct. 45, 91 L. E. 620 17

Swope v. *Darrow* (1939), 188 So. 879, 882, 237 Ala. 692 16

Taylor v. *Alabama* (1948), 335 U. S. 252, 254, 68 S. Ct. 787, 92 L. E. 1935 25

Toledo Scale Co. v. *Computer Scale Co.* (1922), 261 U. S. 399, 43 S. Ct. 458, 67 L. E. 719 21

Treinies v. *Sunshine Mining Company* (1939), 308 U. S. 66, 78, 60 S. Ct. 44, 84 L. E. 85 20

West Ohio Gas Company v. *Public Utilities Commission of Ohio* (1935), 294 U. S. 63, 70, 71, 55 S. Ct. 316, 79 L. E. 761 16

Wiggins Estate Co. v. *Jeffery, et al.* (1944), 19 So. 2d 769, 246 Ala. 183 ..... 1, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19

STATUTES AND OTHER AUTHORITIES CITED

28 U. S. C. 1257 (3) 2

U. S. Constitution Amendment 14, Section 1 ..... 3, 4, 8, 10, 11, 21, 24

Supreme Court of the United States

October Term, 1956

No. .....

CHARLES A. GIVENS

Petitioner

v.

C. A. MOULTON

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

REPORTS OF OPINIONS IN COURTS BELOW

1. *Rose E. Givens, Administratrix, et al.* v. *C. A. Moulton* (1956) 87 So. 2nd 839 (Appendix, pp. 52-62).

2. *Wiggins Estate Co.* v. *Jeffery*, et al. (1944) 19 So. 2d 769 246 Ala. 183 (Appendix, pp. 27-47).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. Your petitioner, Charles A. Givens, on behalf of Rose E. Givens, as administratrix of the estate of James A. Givens, deceased, and said Rose E. Givens, individ-

ually, Robert H. Givens, Susie Kate Tatum, Marie Givens Jeffery, Gerald Stanley Givens, such other heirs of James A. Givens with a right, title or other interest in the lands involved, and on behalf of himself, prays that a writ of certiorari issue to the Supreme Court of Alabama to review:

a. The final judgment of the Supreme Court of Alabama in *Rose E. Givens, Administratrix, et al.* v .*C. A. Moulton* **87 So. 2nd 839, (Appendix, p. 63) made** and entered on March 22, 1956 (R. 327-328), affirming (R. 327) a final decree in equity of the circuit court of Escambia County, Alabama, made and entered on December 6, 1954 (R. 256-260), which decree in effect affirmed prior interlocutory orders dated February 1, 1954 (R. 220-I 220-J) and filed August 27, 1953 (R. 210-211), sustaining the demurrers to amended cross bills of the petitioner et. al. (R. 203-27; 211-218; 220A-220I), and other **related interlocutory orders of said circuit court.**

b. The final order of the Supreme Court of Alabama made and entered on June 14, 1956 (R. 342), denying petition for rehearing of petitioner et al., and dismissing the second petition for writ of certiorari of petitioner **et al. (R. 342);**

c. The final order of the Supreme Court of Alabama made and entered on October 4, 1956 (Supplemental Record 8), dismissing petition for writ of error coram nobis of petitioner et al.

The orders of this Court granting petitioner extensions of time to petitioner within which to file a petition for writ of certiorari were entered respectively on September 12, 1956, and September 27, 1956.

2. The statutory provision which petitioner believes confers on this court jurisdiction to review the judgments

and decrees aforesaid is 28 U.S.C. 1257 (3), (Appendix, p. 95).

The Supreme Court of Alabama, in the case of *Rose E. Givens et al.* v. *C. A. Moulton,* (1956) 87 So. 2d 839, (Appendix, pp. 52-62), has made decisions on several issues, which petitioner believes are in conflict with section 1 to the 14th Amendment to the Constitution of the United States (Appendix, pp. 94-95), thereby denying petitioner of his property without due process of law, abridging his privileges and immunity as a citizen of the United States, and denying him equal protection under the laws.

3. The petitioner contends that this Court has jurisdiction on the following grounds:

a. The Supreme Court of Alabama erred in applying the doctrine of res adjudicata, on the basis of *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) to the instant case in violation of petitioner's rights under section 1 of the 14th Amendment of the Constitution of the United States when it affirmed actions of the circuit court of Escambia County which never had personal jurisdiction over petitioner at any time during the proceedings before it in said *Wiggins Estate Company* v. *Jeffery* (Appendix, p. 62) but which in this case sustained demurrers to pleadings of petitioner et al. to cancel fraudulent deeds derived by respondent in that case. Furthermore, the petitioner was never a party to the appeal in that case to the Supreme Court of Alabama.

b. Petitioner's rights under section I of the 14th Amendment of the Constitution of the United States (Appendix, pp. 94-95) were violated when the Supreme Court of Alabama dismissed the petitioner's petition for writ of error coram nobis with respect to certain missing documents so that many of the documents in question were not considered by the Supreme Court of Alabama

in arriving at its final judgment in the instant case, although they were officially part of the proceedings in the circuit court below and were pertinent to such appeal, and could well have resulted in a reversal by the Supreme Court of Alabama on appeal, where the petitioner was absolutely without fault or negligence on his part, where petitioner had made timely application on two different occasions, and where the failure to send up such documents lay entirely within the circuit court of Alabama.

Cases and laws in support of these grounds are set forth in the statement of the case.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Supreme Court of Alabama err and thereby violate petitioner's rights under Clause I of the 14th Amendment to the Constitution of the United States, in its final judgment in this case affirming the final decree in equity of the circuit court of Escambia County, Alabama, quieting title in respondent and denying title of petitioner et al. in the property involved in this case and the consequential effects of such affirmation, by applying *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) as being res ajudicata on the issue of title in this case when service of process was never personally made on petitioner during the proceedings in *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) when he never made any appearance, either personally or through an authorized attorney in such proceedings, and when he was never a party to the appeal in that case to the Supreme Court of Alabama?

2. Did the Supreme Court of Alabama err, and thereby violate petitioner's rights under section 1 of the 14th Amendment to the Constitution of the United States, in its final judgment in this case affirming the final decree in equity of the circuit court of Escambia County, Ala-

bama, quieting title in respondent and denying title of petitioner, et al. in the property involved in this case and the consequential effects of such affirmation when it dismissed the petitioner's petition for writ of error coram nobis and, thereby did not consider many of the pleadings and documentary evidence in arriving at its final judgment in the instant case, although they were officially part of the official proceedings in the circuit court below, were pertinent to such appeal and could have resulted in a reversal by the Supreme Court of Alabama or reconsideration of its final judgment as a result of such petition where the petitioner was without fault, where the petitioner made timely application on two occasions before entry of final judgment and after such entry and before denial of petition for rehearing thereon, and when the responsibility for such omissions from the record were wholly that of the circuit court of Escambia County, Alabama?

STATEMENT OF THE CASE

1. Facts of Case

Petitioner, with the other heirs of James A. Givens, was part owner of two parcels of property, A and B, in Escambia County, Alabama. The circuit court of Escambia County, Alabama, on the basis of a bill in equity to foreclose a mortgage allegedly given to one Wiggins Estate Company by petitioner et al., entered in January, 1936 a foreclosure decree (pro confesso) on parcel A and upon sale thereof issued in April, 1936 a decree confirming the sale and issuing a deficiency judgment in favor of said Wiggins Estate Company. The Wiggins Estate Company bought in parcel A at the judicial sale, and transferred its foreclosure deed thereunder and assigned the deficiency judgment to respondent in 1938. Respondent, in 1938, secured an order of execution from the circuit court of Escambia County, Alabama, on de-

fault of the deficiency judgment, and execution and levy were had on parcel B. Respondent secured a sheriff's deed as a result of his purchase of parcel B at the judicial sale thereof which was confirmed by the circuit court. Petitioner was not personally served with respect to the proceedings on the foreclosure decree and with respect to the proceedings on the deficiency judgment decree of the circuit court of Escambia County, Alabama. He was only served constructively in those proceedings by registered mail because he was a non-resident of the State of Alabama and resided outside of the state during the proceedings. During the course of these proceedings, petitioner made no appearance whatsoever. All of the other heirs concerned in the present petition were personally served.

As a result of a review of these proceedings by the Supreme Court of Alabama, that court made and entered a judgment on November 16, 1944, affirming, for all practical purposes, the foreclosure decree, the deficiency judgment decree, the orders of sale and confirmations thereunder by the circuit court of Escambia County, Alabama. Petitioner was not a party at all (only being named as a party respondent in the bill of complaint and receiving constructive notice thereof and allegedly represented by an attorney unauthorized by petitioner) with respect to these proceedings, both in the circuit court of Escambia County, Alabama, and in the Supreme Court of Alabama. The opinion of the Supreme Court of Alabama in that case is reported as *Wiggins Estate Company* v. *Jeffery* (1944) 19 So. 2nd 769, 246 Alabama 183 (Appendix, pp. 27-47).

Meanwhile, in 1940 (after proceedings begun in 1937), respondent filed in the circuit court of Escambia County, Alabama, an amended bill of complaint to quiet title in parcels A and B against petitioner et al. and set forth a chain of title in himself to said properties under the

authority of *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47). In 1946 and later, cross bills with documentary evidence were entered by the petitioner et al. alleging fraud and collusion on the part of Wiggins Estate Company, respondent, and others in securing the aforesaid foreclosure and deficiency judgment decrees. These cross bills also alleged fraud and collusion in securing a note and mortgage and other instruments of title from petitioner et al. divesting them of their right, title and interest in said properties. In effect, they asked for the cancellation of the various deeds and instruments of title issued to the respondent in his chain of title, to set aside the fraudulent decrees and to show compliance by petitioner et al., to redeem said properties in accordance with the Alabama law on statutory redemption, and to vest title in petitioner et al. These pleadings in effect were stricken on demurrer (R. 199, 200, 210, 211) based on res adjudicata of *Wiggins Estate Co.* v. *Jeffery* (Appendix, pp. 27-47).

In 1955, prior to the final judgment of March 22, 1956 of the Supreme Court of Alabama in this instant case, petitioner filed a petition for writ of certiorari with said court to issue to the circuit court of Escambia County for certain records in the proceedings in this case which had not been included in the transcript of record sent up to said Supreme Court of Alabama under the certificate of the clerk of said circuit court. Said petition was a timely one and was granted. An order was issued to the clerk of said county to send up certain records. The clerk of the circuit court certified to the Supreme Court of Alabama that he could not find said records but found some other records which were sent up. After the final judgment, but before the denial of the petition for rehearing of the petitioner et al., petitioner filed a second petition for writ of certiorari in order to complete the record before consideration of the petition for rehearing; said second petition for writ of certiorari was dismissed.

Thereafter, petitioner secured two extensions of time from this Court, the first one to permit new counsel for petitioner to examine the record in order to ascertain whether the *Rose E. Givens et al.* v. *C. A. Moulton* (Appendix, pp. 52-62) as decided by the Supreme Court of Alabama came within the jurisdiction of this Court. The second extension of time was granted in order to permit the petitioner to complete the record on appeal for review by this Court and to secure from the Supreme Court of Alabama a clear and positive statement as to whether or not in rendering its final judgment it had considered the question of violation of the rights of the petitioner under section I of the 14th Amendment to the Constitution of the United States.

Petitioner, thereupon, filed a petition for writ of error coram nobis with the Supreme Court of Alabama to accomplish these two objectives. The Supreme Court of Alabama dismissed such petition without opinion (Supplemental Record 8).

Petitioner sets forth below with respect to each issue the parts of the record which show whether a federal question was raised appropriately below.

2. Discussion of Errors

A. APPLICATION OF THE DOCTRINE OF RES ADJUDICATA IN THE PROCEEDING BEFORE THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA, ON THE ISSUE OF TITLE BASED ON THE FINAL DECREE (PRO CONFESSO) IN THE PRIOR MORTGAGE FORECLOSURE PROCEEDING AND THE ANCILLIARY PERSONAL DEFICIENCY JUDGMENT DECREE IS IN VIOLATION OF SECTION I OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE CIRCUIT COURT IN THE PRIOR PROCEED-

ING LACKED PERSONAL JURISDICTION OVER PETITIONER AGAINST WHOM SUCH DOCTRINE WAS APPLIED.

The issue of res adjudicata first arose in this case when the Wiggins Estate Company and another party defendant demurred on July 18, 1951 to an amended cross bill filed on July 19, 1951:

> "The said above named parties demur to that aspect of the bill seeking to rescind on account of fraud mortgage made by Rose E. Givens, individually and as Administratrix of the Estate of James A. Givens, deceased, and * * * by certain adult heirs of the said James A. Givens, to The Wiggins Estate Company, Inc., and the subsequent foreclosure of said mortgage in the Circuit Court of Escambia County, Alabama, Equity Side, and the deficiency decree rendered in said foreclosure suit, and for grounds of demurrer assign the following separately and severally:" (R. 124)——
>
> "Because said bill of complaint charges conspiracy based on the alleged wrongful issuance of a writ of execution based on a deficiency judgment rendered by the Circuit Court of Escambia County, Alabama, Equity Side in a suit wherein the Wiggins Estate Company, Inc. was plaintiff and Rose E. Givens, individually and as Administratrix of the Estate of James A. Givens, deceased, and as guardian of the minor heirs of James A. Givens, deceased, and certain adult heirs of the said James A. Givens, were defendants, and it is not shown or averred that the wrongfulness of said execution and the levy thereunder are shown of record in said cause, but on the other hand, it is shown by the case of *Wiggins Estate Company* vs. *Jeffery*, 19 So. (2d) 769; 246 Ala. 183, that the said mortgage foreclosure proceedings were properly conducted and said deficiency judgment was properly entered." (R. 126).

The respondent also raised the issue in a demurrer of July 28, 1951 to the amended cross bill on the same

grounds as set forth by Wiggins Estate Company and McMillen (R. 128).

On August 29, 1951, Gerald S. Givens, co-defendant with petitioner filed his bill of cross complaint, in which he pointed out

> "the decision was reached without the introduction of any new facts, being in the nature of a bill of review * * * the decision was made under the impression that there was no question of fraud, * * *." (R. 283)

in *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47), and contended that as to himself, on the issue of jurisdiction *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) was not res adjudicata as to his status in this case (R. 291, 292). He said

> " * * * the decision in the case of *Wiggins Estate Corp* v. *Rose E. Givens et al* was without due process of law and should be rescinded, and held as naught." (R. 292).

Petitioner, acting as his own attorney of record in part of the proceedings in the circuit court, adopted as his own, this cross bill of Gerald S. Givens including all the allegations, except with respect to one paragraph which is not pertinent here (R. 144-145).

On November 1, 1951, petitioner in an answer to a cross bill of another of the heirs set forth an exhibit which was a copy of a bill of complaint in the Federal District Court for the ~~Northern~~ "SOUTHERN" District of ~~Florida~~ ALABAMA in which petitioner alleged various fraudulent acts and misrepresentations (R. 148) which would deprive petitioner of his property without due process of law and in violation of the Fourteenth Amendment as set forth in the following language:

> "and the subject matter of this cause involves titles to lands which have been clouded by the fraudulent acts, misrepresentations, and complete breach of confidential relationship reposed in them as lawful repositories of trust in the capacity as counsel and

> legal advisor to Administratrix of the estate of which your Complainant is an heir, depriving your complainant of his lawful inheritance without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, in that to wit: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the Laws.' " (R. 148)

On April 8, 1952 special Judge Edwin C. Page, Jr. entered a decree (R. 197-199) and issued an order on April 11, 1952 sustaining the demurrer of McMillen, Wiggins Estate Company, respondent C. A. Moulton and another party defendant. In issuing said decree and order, special Judge Page sitting in equity in Escambia County, Alabama, stated:

> "It is alleged in the amended cross bill that as regards the lands involved in the suit to quiet title and which were obtained by C. A. Moulton under execution sale under the judgment obtained by *Wiggins Estate Company* v. *Rose E. Givens, et al.*, that the judgment was invalid because of fraud and for lack of due process of law,——" (R. 197)

At this time the circuit court did not pass upon the issue of res adjudicata.

The respondent in a motion to strike the amended cross bill again raised the issue of res adjudicata by stating

> "That the issues raised by said cross bill have been heretofore disposed of by this court and should not properly be presented again for its consideration." (R. 202)

The respondent raised the point that the validity of the mortgage from petitioner, et al. to Wiggins Estate Company and the indebtedness secured were the subject matter of *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) and that suit resulted in a valid judgment which was res adjudicata on these matters in the

instant suit in a demurrer of August 25, 1952 to the cross bill then pending (R. 210).

On September 10, 1952, Judge Page after oral argument said the demurrer "was well taken" and should be sustained and issued an order thereon of September 10, 1952 allowing the petitioner, et al. thirty days to amend (R. 210-R-211). Special Judge T. W. Thagard who replaced Judge Page issued the same order on August 25, 1953 (R. 211).

Finally, a hearing was held on June 15, 1955 at which respondent again raised *Wiggins Estate Company* v. ***Jeffery*** **(Appendix, pp. 27-47) as being res adjudicata to** the instant case (R. 253).

The question of lack of jurisdiction and lack of due process because of the application of *Wiggins Estate* ***Company*** **v. *Jeffery*** **(Appendix, pp. 27-47) as res adjudicata** to the matters now before this court was raised below. The issue of jurisdiction of a court over a judgment presents a federal question, and this Court will question the jurisdiction of a state court on a judgment rendered by it even though such jurisdiction was not challenged in the state court or even in this Court, *Seaboard Air Line Railroad Co.* v. *Daniel* (1948), 333 U.S. 118, 122, 68 S. Ct. 426, 92 L.E. 580.

(1) *Service of Process on Petitioner*

The following are the facts in the record relating to service of process on the petitioner and his appearance, if any, in the Wiggins Estate Company case, either personally or through an attorney authorized by him. The Supreme Court of Alabama in the Wiggins case stated that the foreclosure decrees (pro confesso) "was of default on personal service by sheriff against all parties **except Taylor" (Appendix p. 32). The affidavit of** April 10, 1930, however, of the Wiggins Estate Company

set forth a place of residence and post office address of petitioner in Detroit, Michigan, and requested service by registered mail in accordance with Alabama law (Appendix, p. 79). The sheriff of Escambia County, Alabama, in his return of service and Judge Hare who issued the decree (pro confesso) confirmed service on petitioner by registered mail on November 19, 1930 in Detroit, Michigan (Appendix, p. 82). Petitioner, by affidavit to this court (Appendix, pp. 71-75), states that he never was a resident and never had a legal domicile in the state of Alabama during the entire proceedings of *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47). Furthermore, the record in this case shows statements by petitioner which support his affidavit. In a complaint filed under oath in the Federal District Court for the ~~Northern~~ District of ~~Florida~~ in July, 1946 (R. 147), introduced as an exhibit in this case, petitioner states he was then a "citizen of Okaloosa County in the State of Florida—and a Lieutenant in the United States Maritime Service, now on active duty as a marine engineer;" (R. 148). He also told that court "your complainant has for several years passed been engaged in the service of his Government; thereby, necessitating his being beyond the seas." (R. 167).

In plaintiff's annex and supplement to his answer and cross bill of November 23, 1951 he states that

> " • • • in the spring of 1930, I received a notice of foreclosure of the Wiggins Estate Corp. Mortgage, by mail at my boarding place in Detroit, Mich. I came home immediately and this was the first time I had been home in five years. I went to see Mr. Caffey, who outwardly appeared glad to see me. He told me he would hold up the foreclosure if I would attempt to sell some timber, and suggested that I see one of our former lessors, Mr. T. C. Fuqua. I did, and put in considerable time in attempting to sell several thousand acres of timber belonging to my father's estate in Florida." (R. 182)

The sheriff in attempting to serve a cross bill of complaint on petitioner on September 8, 1937 reported petitioner "not found in my county after diligent search and inquiry." (R. 22) It would appear, therefore, that the petitioner's contention that he was not personally served in the proceedings on *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) is borne out by the facts. Petitioner was not a resident of the state of Alabama from sometime prior to 1930 when the Wiggins Estate Company complaint was filed until at least 1946 and he was not personally served, contrary to the opinion of the Supreme Court of Alabama (Appendix, p. 32).

(2) *No Appearance by Petitioner*

The next question of fact that arises is whether petitioner made any appearance personally or through an attorney authorized by him in the Wiggins Estate Company proceedings. Parts of the bill of review in the Wiggins Estate Company case as filed by petitioner under oath herein (Appendix, pp. 76-123) with this Court show the following facts:

A summons was issued by the registrar of the circuit court on March 25, 1935 (Appendix, p. 88) which was ordered to be served the petitioner and others by personal service in further proceedings on reference by the court after the pro confesso decree on the foreclosure.

The above record in the Wiggins Company case does not show a return on that order for a summons, but one Hugh R. Williams on May 11, 1935 filed a demurrer to the bill of complaint and signed himself as "Solicitor for Respondents" (Appendix, p. 90).

In response to an order for summons to issue to petitioner in June, 1935 (Appendix, pp. 92, 93), the sheriff reported service on said Hugh R. Williams as attorney of record for petitioner (Appendix, p. 93) on June 20, 1935.[1] ePtitioner did not file an answer to the bill of

[1] The decree (pro confesso) was rendered on November 19, 1930 and it shows constructive service on petitioner.

complaint and Judge Hare of the circuit court of Escambia County, Alabama, thereupon issued a decree (pro-confesso) as to petitioner and other parties defendant on July 15, 1935. Petitioner was not a party to the bill of review filed by certain of the heirs in the circuit court of Escambia County in August, 1941 (Appendix, p. 77) (see also *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 30, 31)). The question, therefore, arises that under these circumstances whether Hugh R. Williams who appeared on a few other occasions in the Wiggins Estate Company proceedings for heirs other than petitioner (Appendix, pp. 86, 89) was authorized at any time to appear as his attorney. Petitioner under affidavit to this court states that he never authorized Mr. Williams to represent him, that he never in any way acquiesced or ratified or approved any such representation by Mr. Williams in the Wiggins Estate Company proceedings and that he first learned of such unauthorized representation in November, 1956 when his present counsel told him by long distance telephone after examining the record and informed him of the contents in the record of the Wiggins Estate Company case (Appendix, pp. 71-75).

It is, therefore, apparent that this Court must determine from the facts whether such representation was authorized or unauthorized. Petitioner did not file any document pleading or make any appearance whatsoever in his own name in the Wiggins Estate Company proceedings. Petitioner has no recollection of ever having heard the name of Hugh R. Williams (Appendix, p. 73). It should be noted that original foreclosure decree (pro confesso) was filed on November 19, 1930 with respect to which petitioner had been constructively served and at which time he had made no appearance whatsoever in the case (Appendix, pp. 81, 82). Hugh R. Williams first appears in the case on June 20, 1934 as

attorney for Robert H. Givens and Mrs. Marie Givens Jeffrey (Appendix, pp. 84-87). He also appears as attorney for Robert H. Givens as next friend of Stanley Givens and Kate Givens in a pleading filed on July 3, 1935 (Appendix, p. 89). The conclusion which must be drawn is that the petitioner did not appear in the Wiggins proceedings in any capacity whatsoever, other than as a party respondent named in the bill of complaint and in other pleadings filed by the Wiggins Estate Company.

The records of the Wiggins case are within the purview of this Court on the matter of jurisdiction since this Court has ruled on matters described by the record of a case submitted along with the case presented for judicial consideration by the Court. *West Ohio Gas Company* v. *Public Utilities Commission of Ohio* (1935) 294 U.S. 63, 70, 71, 55 S. Ct. 316, 79 L.E. 761. This Court has indicated that it will consider these records where the parties are substantially the same and the judgment rendered constitutes the basis of the offense or defense of the case in bar; *Butler* v. *Eaton* (1891) 141 U.S. 240, 242, 243, 11 S. Ct. 985, 35 L. E. 713.

Petitioner has shown above that he was not before the circuit court of Escambia County personally in the Wiggins Company case. Furthermore, he was not privy during those proceedings to any of the other parties in those proceedings. He had no privity with Rose E. Givens, defendant administratrix. *Ledbetter* v. *Wesley* (1927) 23 F. 2d 81, 90, certiorari denied, 276 U. S. 631, 48 S. Ct. 324, 72 L. E. 741; *Swope* v. *Darrow* (1939) 188 So. 879, 882, 237 Ala. 692. He was not privy to any of the other defendants; *Bigler* v. *Waller* (1872) 14 Wall 297, 307, 20 L. E. 891, nor was petitioner privy with respondent Moulton even when they were co-tenants; *Glover* v. *McFaddin* (1951) 99 F. S. 385, 390, affirmed 205 F. 2d 1 certiorari denied 346 U. S. 900, 74 S. Ct.

227, 98 L. E. 400, rehearing denied 346 U. S. 940, 74 S. Ct. 376, 98 L. E. 427. In other words even though petitioner was named by respondent in the bill of complaint (R. 60) filed in 1940 in the circuit court of Escambia County petitioner was a stranger to those proceedings and was not bound personally by the final judgment therein; *State of Texas* v. *Chuoke* (1946) 154 F. 2d 1, 2, certiorari denied 329 U. S. 714, 67 S. Ct. 45, 91 L.E. 620.

The foreclosure decree in the Wiggins case is quasi in rem. *Potter* v. *Foster* (1932) 64 S. W. 2d, 520, 523, 524, 16 Tenn. App. 336; *McCorkle* v. *Hamilton, (Texas Civic App.)* (1941) 150 S. W. 2d 439, 442 error refused. That foreclosure decree is treated like all other decrees in similar proceedings affecting real property, *Shepherd* v. *Ware* (1891) 48 N. W. 773, 774, 46 Minn. 174. The foreclosure decree in the Wiggins proceedings operated against petitioner's property interest in Parcel A, since admittedly he had received constructive notice of the proceedings; *Dewey* v. *Des Moines* (1899) 173 U. S. 193, 202, 203, 19 S. Ct. 379, 43 L. E. 665, but petitioner does not lose thereby any personal defense he may have in the instant action since as a non-resident of Alabama he was not personally served during the Wiggins Estate Company proceedings; *Dewey* v. *Des Moines Op. cit.; First National Bank of Mobile* v. *Burch* (1939) 188 So. 859, 867, 237 Ala. 680; *Saunders* v. *King* (1941) 37 N. E. 2d 92, 93, 63 Ohio Appeals 313. The foreclosure decree in the Wiggins case insofar as its effects personally on the petitioner are concerned is void.

It naturally follows that the personal deficiency judgment decree (pro confesso) on April 21, 1936 (Appendix, pp. 34, 101) in the same proceedings is also void as it affects the petitioner because of the lack of personal service on him and because of the lack of any legitimate appearance by petitioner personally or by his authorized

attorney, *McQuillen* v. *Dillon* (1938) 98 F. 2d 726, 729, certiorari denied 305 U. S. 655, 59 S. Ct. 251, 83 L. E. 424. The reason for this is that the deficiency judgment decree is essentially a debt; *McDonald* v. *Mabee* (1917) 243 U. S. 90, 91, 37 S. Ct. 343, 61 L. E. 608; *Owens* v. *McCloskey (Owens* v. *Henry)* (1896), 161 U. S. 642, 645, 16 S. Ct. 693, 40 L. E. 837.

Since the foreclosure and deficiency judgment decrees (pro confesso) were void as to the petitioner personally, the application of the doctrine of res adjudicata in this case on the basis of *Wiggins Estate Company* v. *Jeffery* **(Appendix, pp. 27-47) deprived petitioner of property** rightfully his without due process of law.

(3) Fraud and Collusion in Procuring Decrees and Mortgage.

Petitioner and other heirs introduced pleadings and documentary evidence to show alleged fraud and collusion on the part of Wiggins Estate Company, respondent Moulton and others in the procurement of the deficiency and foreclosure decrees (pro confesso) and fraud and collusion in procurement of the mortgage and note on the basis of which said foreclosure was had (R. 98, 130, 144-167, 174-188, 195-196, 282-309).

There were many specific charges in these pleadings and evidence made. For example, despite the fact that the petitioner alleged (R. 243) grossly inadequate sale prices as a result of the judicial sales in the Wiggins **proceedings the circuit court of Escambia County did** not permit any inquiry at all into the issue of title because title in respondent Moulton was settled by the final judgment in the Wiggins Company case. This was error, *Johnson* v. *Davis* (1912) 60 So. 799, 800, 180 Ala. 143. This fact is shown by the following examination of petitioner by his attorney at the hearing in the instant **case. (R. 253)**

"DIRECT EXAMINATION BY MR. OWENS:

Q Is this Mr. Charlie Givens?
A Yes sir.
Q Mr. Charlie, you are one of the heirs of J. A. Givens?
A Oldest son.
Q And Mrs. Rose E. Givens was your mother?
A Yes sir.
Q Now I'm going to show you here Mr. Givens, a photostat of a mortgage purportedly signed by Mrs. Rose E. Givens, individually and as Administratrix for the Estate of James Alexander Givens, deceased, and as guardian for Rose Marie Givens, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, minor heirs of James Alexander Givens, deceased: Herman Moll, Bertha Moll, Angelyn Taylor, R. P. Taylor and yourself, Charlie Givens, to the Wiggins Estate Company, dated 26th day of June, 1926, and ask you if you can identify that as an instrument which you signed at that time?
A Well, I signed this in Michigan, with a letter from Hugh Caffey enclosed with it to show—
MR. BROOKS: Now we object to any attack here in this proceeding on that mortgage that he is enquiring about, for the reason that it was the distinct, express and only subject of the litigation in this court which went to the Supreme Court styled "Wiggins Estate Company vs. Jeffrey," and reported in 19 Southern Reporter, Second Series, beginning on page 769, and all questions concerning the validity of that mortgage were litigated and decided in that case.
THE COURT: Objection sustained.
MR. OWENS: We reserve an exception to the ruling of the Court."

Inadequate sale price was just one of the allegations in connection with the fraud charges. It was highly irregular, petitioner contends, for Hugh R. Williams to serve as attorney for respondent Moulton in 1937 in the instant case against petitioner and the other heirs after he had acted as attorney for some of the heirs in the prior proceedings in *Wiggins Estate Company* v. *Jeffery* (Appendix, pp. 27-47) in 1935).

The nature of these charges are briefly summarized as follows by petitioner. (R. 165)

> "(a) By failure to offer will in Probate for determination by that lawfully constituted authority to effect interpretations prior to issuance of letters of administration.
>
> (b) Failure to file inventory and appraisal of assets as required by law.
>
> (c) Failure to make any accounting of the said estate annually or finally.
>
> (d) The making of mortgages on infants' land without the authority of court and for inadequate consideration for the securities demanded. For misrepresentation as to the type and legal effect of mortgages drawn and taken by those in a position of trust arising from the confidential relationship imposed upon the said confederating parties Hugh M. Caffey, Jr. and Ed Leigh McMillan.
>
> (e) By incorrect statement of the considerations contained in mortgages unlawfully procured by them, and by such considerations shocking to conscience for securities taken.
>
> (f) By fraudulent representations to the courts of Alabama in foreclosure proceedings thereon taken.
>
> (g) And finally becoming purchasers at their own sale, such sales possible of being effected to the benefit of the said estate in parcels and not in mass as was so done, after denying your complainant and other heirs the right to redeem all such lands by either payment in cash or by working the lands for revenue possible to be derived therefrom."

Since the petitioner in the Wiggins case was not personally before the Court, he had the right to attack it collaterally for fraud, *Kingsbury* v. *Buckner* (1890) 134 U. S. 650, 669, 10 S. Ct. 646, 33 L. E. 1047 and for lack of jurisdiction, *Treinies* v. *Sunshine Mining Company* (1939) 308 U. S. 66, 78, 60 S. Ct. 44, 84 L. E. 85. It makes no difference in this case whether the fraud is intrinsic or extrin-

sic, *Toledo Scale Co.* v. *Computer Scale Co.* (1922) 261 U. S. 399, 43 S. Ct. 458, 67 L. E. 719. Petitioner had the right in the instant suit to quiet title to challenge that title for fraud even if he were a party without fault to the foreclosure and deficiency decree in the Wiggins proceedings, *Anglo-California Trust Co.* v. *Kelley* (1931) 4 P. 2d 604, 605, 117 Cal. App. 692. Under Alabama law petitioner should not have been cut off in the instant proceedings for he had the right to quiet title and redeem, if necessary, from a fraudulent sale, *Norville* v. *Seeburg* (1920) 87 So. 164, 167, 205 Ala. 96, nor was petitioner barred by statute of limitations in the State of Alabama, *W. T. Smith Lumber Co. v. Barnes* (1953 Ala.) 66 So. 2d 77, 81. He had ten years from the first time he discovered the fraud in 1945 to raise the issue of fraud and he did so at the first opportunity in 1951. The Fourteenth Amendment protects petitioner from fraud of this kind, particularly when there was no service upon him during the Wiggins proceedings, *Simmon* v. *Southern RR Co.* (1915) 236 U. S. 115, 122, 35 S. Ct. 255, 59 L. E. 492.

(4) Statutory Redemption

For the same reasons as set forth above petitioner was entitled to show compliance with the statutory redemption laws of Alabama. Under the laws of Alabama petitioner had two years from confirmation of judicial sales in this case to exercise his statutory right of redemption. On Parcel A this right ran from about April 1936 to April 1938 and in the case of Parcel B from October 1938 to October 1940. This right can not be destroyed by a State Court, *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill* (1929) 281 U. S. 682, 50 S. Ct. 451, 74 L. E. 1107, yet the record in the instant case shows that on several occasions petitioner pleaded facts to redeem and testimony thereon (R. 182 and 293) which were not considered by the Court.

The following is an excerpt from the record of the hearing on June 15, 1955 in the instant case (R. 256);

"Q Was your mother in possession of the land at that time?
A She was. She was in possession of the land till the land was sold under deficiency decree in the Wiggins Estate Mortgage.
Q Right on up till 1938, is that correct?
A I forget the exact date.
Q I'll ask you Mr. Givens if during this time there you and the other members of your family were willing and tried to pay off the tax liens and tax judgments held by—
MR. BROOKS: We object to that.
THE COURT: I sustain the objection.
MR. OWENS: That's all."

The right to redeem prescribed by state law is a substantial right under the Constitution and recognizable by this Court, *Parker* v. *Dacres* (1889) 130 U. S. 43, 48, 9 S. Ct. 433, 32 L. E. 848. Such right to redeem was taken away from him, by the action of the circuit court of Escambia County in substaining demurrers and objections to any matter concerned with redemption on that basis of the doctrine res adjudicata as set forth in the Wiggins case and which action was affirmed in effect by the Supreme Court of Alabama in its final judgment. Since he had a statutory right of redemption of his property, petitioner has been deprived of his property without due process of law.

B. WRIT OF ERROR CORAM NOBIS

After the petitioner filed his notice of appeal with the circuit court and in the Supreme Court of Alabama his counsel, who was relatively new in the case considering the time which had elapsed since the present suit began in 1937, noticed certain records with which he was personally familiar were missing from the transcript of record. He immediately filed a petition for writ of certiorari in September 1955 with the Supreme Court of Alabama to issue to the circuit court of Escambia County, Alabama to complete the record and send up missing documents. The

writ was issued (R. 48) The clerk of the circuit court certified to the Supreme Court of Alabama that he could not find said records but did find others which were apparently also missing and he certified them and placed them in the transcript of the record in the instant case (R. 49). The Supreme Court of Alabama rendered its decision on March 22, 1956 (Appendix, pp. 52-62). Thereafter in May 1956, counsel for petitioner learned of the existence of certain other records in the case and filed a second petition for writ of certiorari before the petition for rehearing was denied (R. 339, 340). Upon objection by counsel for respondent Moulton (R. 341) the Supreme Court of Alabama dismissed the petition for writ of certiorari at the same time it denied the petition for rehearing on June 14, 1956.

In August 1956, petitioner, after careful consultation with counsel, decided to file a petition for writ of certiorari to this Court to issue to the Supreme Court of Alabama in the instant case. He asked counsel on this petition to study the record. Present counsel in this petition made application to this Court for a thirty day extension of time from September 12, 1956 to October 11, 1956 in order to permit counsel to analyze the record. Such extension was granted until October 11, 1956, by this Court. Counsel for petitioner learned of the missing records and secured another extension from this Court until November 10, 1956 in which time counsel was given to complete the record and to ascertain from the Supreme Court of Alabama whether it had considered the due process clause in this case and what its opinion should have been on that issue.

Petition for writ of error coram nobis was filed with the Supreme Court of Alabama on September 21, 1956 in which there appeared an affidavit from the clerk of the circuit court of Escambia County, Alabama, setting forth that additional documents were in his possession which should be in the transcript of record in the case and an af-

fidavit by petitioner listing a number of individual exhibits of petitioner et al. which had been put into the record as part of various cross bills of complaint and which he had found in the files of the circuit court of Escambia County, Alabama. None of the documents were attached to the petition for writ of error coram nobis because the clerk of the circuit court did not have an opportunity to prepare copies thereof in the short period of time between October 4, 1956 and November 10, 1956. The Supreme Court of Alabama on October 4, 1956 without hearing and without requesting any briefs from petitioner or respondent **dismissed the petition for a writ for error coram nobis without opinion (Appendix, p. 65).**

This action by the Supreme Court of Alabama has greatly handicapped the petitioner in preparation of the case because of the incomplete transcript. Petitioner, therefore, has submitted to this Court under affidavit such copies of the records as he could find under the circumstances, and places them in the record of the case. The Court as it has in the past can examine such records and consider them as part of the record in the case, *The Grapeshot* (1869) 7 Wall 563, 564, 19 L. E. 83. The question arises, therefore, as to the effect of the dismissal by the Supreme Court of Alabama of the petition for writ of error coram nobis under section 1 of the Fourteenth Amendment of the Constitution of the United States. Petitioner in the petition for the writ of error coram nobis stated very carefully that deprivation of his use of such records would in effect deprive him of due process as he would be unable to produce his own evidence introduced in the case to establish his title to the property involved.

Petitioner also asked in said petition for the Court to set aside its final judgment of March 22, 1956 and to reconsider the case on the basis of the record including the missing documents. This was not done.

The writ of error coram nobis was under the common law brought up before the court to correct certain mistakes of fact not put in issue or passed upon by that court. It did not lie to correct errors in the judgment itself, *Bronson v. Schulten,* (1882) 104 U. S. 410, 26 L. E. 797.

It is within the power of a court to amend its record, correct mistakes and use information obtained after a judgment is issued even after the term in which such judgment is rendered. If the petition, as in this case, is filed in a term of court after the end of the term in which the judgment was rendered, then an appeal may be had on such petition for the correction of the judgment *Gagnon* v. *U. S.* (1904) 193 U. S. 451, 24 S. Ct. 510, 48 L. E. 745. A judgment on a petition for a writ of error coram nobis is treated as a final order and is subject to review by a higher court, *People* v. *Kemmitz* (1938) 15 N. E. 2d 883, 886, 296 Ill. Appeals 119. Even if a judgment on a petition for a writ of error coram nobis is not final it is still reviewable to prevent the possibility of a miscarriage of justice, *State ex rel Emmert* v. *Gentry* (1945) 61 N. E. 2d 182 183, 184, 223 Ind. 418, 159 A. L. R. 127.

> "For it is not a trial of the original case, but merely a determination of whether or not some fact or facts were in existence but unknown . . . which, if known, would have caused the Court to rule differently." *State ex rel Emmert* v. *Gentry* (1945) 62 N. E. 2d, 860, 862, 223 Ind. 535, 161 A. L. R. 532.

A decree on a petition for error coram nobis is one that affords due process under the Fourteenth Amendment, *Taylor* v. *Alabama* (1948) 335 U. S. 252, 254, 68 S. Ct. 787, 92 L. E. 1935.

Petitioner, therefore, submits that in view of the circumstances under which the documents have not been put into the record to the great detriment of petitioner who is without fault, the action of the Supreme Court of Alabama is one of those reviewable by this Court and the dis-

missal by the Supreme Court of Alabama of petitioner's petition for writ of error coram nobis raises an issue of due process because he would otherwise be deprived of his property.

Wherefore, Petitioner prays that the Writ may duly issue.

Respectfully submitted,

CHARLES BRAGMAN
Counsel for Petitioner

APPENDIX

WIGGINS ESTATE CO., Inc., et al. v. JEFFERY et al.
3 Div. 405.

Supreme Court of Alabama.
Nov. 16, 1944.

1. *Equity*—442, 462

A bill of review to set aside decree is a direct attack on the decree and may be challenged as to sufficiency by demurrer. Code 1923, §§ 6600-6608.

2. *Equity*—446

To authorize a bill of review the error must be of substance, prejudicial to complainant, and error must appear on face of pleading, proceeding or decree.

3. *Mortgages*—553

Where party complainant to mortgage foreclosure suit purchases at the sale, it is subject to risk that judgment may be reviewed or revised, and one who is the immediate purchaser from such party litigant is not a bona fide purchaser and is subject to the rules of law touching his grantor.

4. *Equity*—452
Limitation of actions—72(1)

Bill of review to set aside decree foreclosing mortgage executed by administratrix and guardian was not barred by laches or the three year statute of limitations where bill was filed within three years after complainant heir had attained his majority. Equity Rule 66, Code 1940, Tit. 7 Appendix; Code 1923, §§ 6607, 6608, 8960; Code 1940, Tit. 7, § 36.

5. *Equity*—452

Bill of review to set aside decree foreclosing mortgage executed by administratrix and guardian was barred by

laches as to heirs who attained their majority more than three years prior to filing of bill and their rights were not saved by fact that bill was filed within three years after another heir had attained his majority. Equity Rule 66, Code 1940, Tit. 7 Appendix; Code 1923, §§ 6607, 6608, 8960; Code 1940, Tit. 7, § 36.

6. *Taxation*—507, 573½

Taxes assessed against property create personal liability of owner and are a lien against property duly assessed.

7. *Taxation*—507

Tax lien applies against property of an infant as well as against property of an adult.

8. *Infants*—98

The burden of proof on question of necessaries of infant is on one who asserts liability.

9. *Infants*—105

In proceeding to foreclose mortgage executed to obtain money for payment of taxes on infant's realty, court has right to enforce payment of mortgage by its foreclosure and to render a deficiency decree under its supervision.

10. *Taxation*—572, 632

Taxes against a minor's property are an obligation the law requires him to pay and will be enforced by the sale of his property or procedure in court for enforcement thereof.

11. *Infants*—50

Taxes against a minor's property are "necessaries" of the minor.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessaries".

12. *Infants*—116

Where mortgage was executed to obtain money for payment of taxes on infant's realty, on foreclosure of mortgage infant was not liable for attorney's fees.

13. *Equity*—66
Infants—105, 114

Where mortgage was executed to obtain money to pay taxes on realty in which infant had a one-eighth interest, deficiency judgment was excessive as against the infant as to amount thereof in excess of the infant's aliquot part of the debt for money to pay taxes, and the error operated to vacate execution sale under the judgment in so far as he was concerned, but on bill of review filed within three years after he attained his majority, relief would be granted only on condition that he pay his aliquot part of the debt. Equity Rule 66, Code 1940, Tit. 7 Appendix; Code 1923, §§ 6607, 6608, 8960; Code 1940, Tit. 7, § 36.

Appeal from Circuit Court, Escambia County; F. W. Hare, Judge.

Bill of review by Rose Marie Givens Jeffery, Lillian Mozelle Givens Greer, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens against Wiggins Estate Company, Inc., and C. A. Moulton, to set aside decrees rendered in a former suit and deeds of conveyance made thereunder. From a decree granting the relief prayed as to complainant Gerald Stanley Givens and denying relief as to other complainants, respondents appeal and complainants other than Gerald Stanley Givens cross-assign errors.

Corrected and affirmed.

Leon G. Brooks, of Brewton, for appellants.

C. L. Hybart, of Monroeville, for appellee and cross-appellants.

THOMAS, Justice.

[1] The appeal is from a decree in equity on a bill of review filed under the provisions of Code 1923, §§ 6600-6608, Code 1940, Equity Rules Tit. 7 Appendix. It is a direct attack on the decrees in question. Vaughan v. Brue et al., 245 Ala. 107, 16 So. 2d 17, 150 A.L.R. 668. A bill of this nature may be challenged as to sufficiency by demurrer. Clements v. Clements, 200 Ala. 529, 76 So. 855; 30 C.J.S., Equity, page 1084, § 648.

We shall consider at length that no tenable ground of demurrer may be sustained to the right of Gerald Stanley Givens to maintain the bill. Mitchell v. Hardie, 84 Ala. 349, 4 So. 182, 183; Stuart v. Strickland, 203 Ala. 502, 83 So. 600; Graves v. Brittingham, 209 Ala. 147, 95 So. 542; Code 1923, § 6607, Equity Rule 66, Code 1940, Tit. 7 Appendix.

The appeal is from a decree overruling demurrers of the respondent to the bill of complaint as to Gerald Stanley Givens, one of the five complainants. The bill seeks to set aside decrees rendered by the circuit court on January 21, 1936, directing the foreclosure of a mortgage on lands; and on April 21, 1936, confirming the sale of said lands under the decree, and rendering a deficiency judgment or decree against these complainants.

The bill of review was filed by the several minors without consent of the court under Equity Rule 66, Code 1940, Tit. 7 Appendix, p. 1099. The substantive right asserted by the bill had accrued in 1938. No ground of demurrer challenged the bill for its filing without consent of the court as it was recognized to be within the amended rule.

Among the old books cited in Planters' & Merchants' Bank v. Dundas et al., 10 Ala. 661, is Perry v. Phelps, 17 Vesey Jr.'s Reports, 177, wherein Lord Chancellor Eldon said of bills of review that, "The question, whether the

cause is well decided, will be argued in that shape: not, whether the Decree is right or wrong on the face of it. The cases of error apparent, found in the books, are of this sort; an infant not having a day to show cause &c.; not merely an erroneous judgment."

The matter was considered by Judge Stone in McDougald's Adm'r v. Daugherty, 39 Ala. 409, saying that for error apparent, it is permissible to look to the pleadings, the minute of the testimony of the hearing, the decree of the chancellor, the accompanying opinion on which he states the reasons on which the decree is based and all the proceedings in the original cause, except the testimony. The later cases stating the rule are: Rochelle v. Rochelle, 237 Ala. 530, 187 So. 451; Richards v. William Beach Hardware Co., 242 Ala. 535, 7 So. 2d 492, touching a case of newly discovered evidence.

A condensed statement of the facts presented by the bill of review filed on August 26, 1941, and a digest of the suit exhibited, leading to the decrees assailed bring within narrow limits the questions to be determined. They are: (1) Whether the court had jurisdiction of the parties and the subject-matter in rendering the decree of January 21, 1936, ordering the foreclosure of the mortgage, and entered said decree without committing an error of law; and (2) whether the decree of April 21, 1936, was likewise within the authority of the court and free from error as to the deficiency judgment.

The facts stated in the pleading are that James Alexander Givens died prior to June 26, 1926, without a will, leaving as his heirs and next of kin Rose E. Givens, his widow, and the following named children: Bertha G. Moll, Angeline G. Taylor and Charles Givens, who were over twenty-one years of age; Rose Marie Givens, Lillian Hozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, who were minors. He owned all of the real estate which is the subject-matter of the

suits. The widow was appointed administratrix of his estate and appointed guardian for the five minor children, who are complainants in this bill. On June 26, 1926, Rose E. Givens, individually and as administratrix of said estate, and as guardian of said minors, together with the adult heirs, negotiated a loan of $2,000 from Wiggins Estate Co., Inc., "for the purpose of paying taxes and expenses due upon the real estate belonging to the heirs of the said James Alexander Givens, deceased." A promissory note due June 26, 1927, was given to evidence this loan signed as an individual, as administratrix, and as guardian by Rose E. Givens and by two of the adult heirs, and was delivered to the Wiggins Estate Co., Inc., together with a mortgage on 1,684 acres of real estate, specifically described in Escambia County, Ala.

Default being made in payment of the debt, mortgagee filed a bill to foreclose against the adult heirs and Rose E. Givens, individually, as administratrix, and as guardian of the heirs who were minors when the mortgage was made. The mortgage was signed by Rose E. Givens, individually, and in her representative capacity, and by the adult heirs.

The answer by R. P. Taylor contains denials, alleging that he joined as the husband of an heir, was not liable to a judgment over or for costs, and alleges that he was promised there should be no deficiency judgment against him. The decree following was that of default on personal service by sheriff against all parties except Taylor, and no such judgment was rendered against him. An order of reference followed, reciting that the minors were represented by guardian. A cross bill was filed by Robert H. Givens and Rose Marie Givens Jeffery, praying cancellation of mortgage as a cloud on their title. Kate and Stanley Givens nominated a guardian ad litem who accepted appointment and denied the material allegations. One Williams, as next friend of Stanley and Kate Givens,

made them parties to the answer and cross bill filed by Robert Givens and Marie Jeffrey, and alleged they were owners of an interest in the property affected by foreclosure. Then followed an order reciting decrees pro confesso against the other heirs. There was submission on reference by complainants' attorneys and the report of the register found due on mortgage $2,330.81, and $349.62 as attorney's fees.

Complainants submitted on the original bill and exhibits, decree pro confesso, answer to cross bill, testimony of the notary before whom the original bill was sworn to and complainants' attorney. "The respondent submitted on answer to bill of complaint as amended and cross bill." It is noted that neither the attorney in fact nor the guardian ad litem contested the validity of the debt of the minors. The decree of sale of June 21, 1936, recites that the money loaned on the mortgage was for preservation of the estate of said heirs; that if Rose E. Givens, as administratrix of the said estate and as guardian of the minors, had applied to the court in the first instance for authority to join the adult heirs in obtaining the loan for the purpose of paying debts then due, the court would have entered a decree authorizing the same; that said loan be ratified and confirmed in all respects as if authorized at the outset and that the interests of the heirs who were minors when the loan was obtained by their guardian should be sold along with the interests of the adult heirs who executed the note and mortgage; and that Rose E. Givens, as administratrix and as guardian, had agreed when she obtained the loan and executed the mortgage that she would if necessary have the same approved and ratified by appropriate proceedings to that end, so that the court would treat as done what in equity and good conscience she should have done. The court further declared (1) a lien upon the lands for the debt with interest and attorneys' fees as shown by the report of the register on the reference and ordered the property

sold by the register at public sale after due advertisement; (2) that the amount due the complainants be satisfied with the proceeds of the sale in whole or in part and any surplus paid to the respondents; that (3) if the amount realized should be insufficient to pay the debt and costs, the register should upon confirmation of the sale enter a deficiency judgment and decree against all of the respondents individually as well as Rose E. Givens, as administratrix of said estate and as guardian of the minors, for such sum as should remain due after duly crediting the proceeds of the sale. The register was ordered to report his sale to the court for confirmation or rejection as the court should rule.

After sale and report by the register, the court entered an order of confirmation. On April 21, 1936, on motion of the complainants, it adjudicated the balance due on the debt, after crediting the proceeds of the sale, to be $928.70, and rendered a deficiency judgment for that amount against all the respondents individually and against the administratrix and guardian of this complainant.

A foreclosure deed was made to Wiggins Estate Company, Inc., the mortgagee, purchasing at the sale, conveying to it the real estate embraced in the mortgage. On May 10, 1938, Wiggins Estate Company, Inc., conveyed its title to C. A. Moulton and assigned to him the deficiency judgment rendered in favor of Wiggins Estate Company, Inc., and against respondents in said judgment. On August 1, 1938, execution was issued, and on said judgment the sheriff levied upon a large body of other lands of the respondents, sold the same to appellant C. A. Moulton, and executed and delivered to him the sheriff's deed of date of October 10, 1938, to 1.650 acres of additional lands. The lands dealt with under those decrees aggregated 3,334 acres and the homestead of the minors.

The record shows that the decrees in the court below rested, Turner v. Turner, 193 Ala. 424, 69 So. 503, as to the appellees on the unauthorized actions and admissions of their guardian. This case was tried under Code 1923, § 6600, Equity Rule 32, Code 1940, Tit. 7 Appendix, and submission had on decrees pro confesso as to the respondents. Howell v. Randle, 171 Ala. 451, 54 So. 563 [8].

The record shows that the pleading did not deal with the minor's interest in the debt and land as "necessaries," and that it was a proceeding by consent, which a guardian may not give in the case before us.

Appellants insist that the bill was barred by the statute of limitation of three years.

(2) That the decree of January 21, 1936, was rendered by the court in the exercise of its proper powers, and after the respondents were properly before the court, and hence that these decrees cannot be attacked by a bill of review.

(3) That the decree of April 21, 1936, was likewise within the jurisdiction of the court and was rendered in the exercise of its lawful powers and that this decree cannot be set aside by a bill of review.

The circuit court eliminated all of the complainants except Gerald Stanley Givens by its rule on demurrers and entered a final decree in the case setting aside the two decrees under attack, holding that Gerald Stanley Givens still owned a one-eighth interest in said real estate, and directing the vacation of said decrees as to him, ordering the cancellation as to him of the foreclosure deed from the register of the court to Wiggins Estate Company, the deed from Wiggins Estate Company touching the lands embraced in that mortgage to C. A. Moulton, and the deed from the sheriff to C. A. Moulton to the other lands of these complainants not embraced in the mortgage. Such is the effect of that decree.

[2] This court has declared of the nature of bills of review that the error must be (1) of substance; (2) prejudicial to the complainant; and (3) the error must appear on the face of the pleading, proceeding or decree. Richards v. William Beach Hardware Co., 242 Ala. 535, 7 So.2d 492; Snead v. Lee, 218 Ala. 44, 117 So. 469; Rochelle v. Rochelle, 237 Ala. 530, 187 So. 451. No question of new evidence was presented.

[3] A phase of the case that will be noted is that the instant bill is not for redemption, but of review for material errors apparent on the face of the record touching the original parties, properties and immediate purchaser. The latter is charged with notice. The party complainant to the foreclosure suit purchased at its own sale was subject to the risk that the judgment may be reviewed or revised. One who is the immediate purchaser from such party litigant is not a bona fide purchaser and is subject to the rules of law touching his grantor. Vaughn et al. v. Brue et al., 245 Ala. 107, 16 So.2d 17, 150 A.L.R. 668, and the many authorities cited, among which are Marks v. Cowles, 61 Ala. 299, etc. It follows that C. A. Moulton by his purchase from the mortgagee purchasing at its foreclosure is ruled by the law that infected the title to the lands, and subjects him to the right of Gerald Stanley Givens.

[4, 5] The ground of demurrer challenging the bill under the statute of limitations, or other grounds assigned, as to Gerald Stanley Givens is not well taken. His bill of review was filed after he had attained his majority and within the statutory limit of three years. Code 1923, § 6608, Equity Rule 66, Code 1940, Tit. 7 Appendix; Code 1923, § 8960, Code 1940, Tit. 7, §36; Bishop v. Johnson, 242 Ala. 551, 7 So.2d 281. The other appellees cross-assigning error were not so circumstanced as to time after reaching their respective majorities and do not have this right of action against the purchaser at the mortgage foreclosure sale or its assignee.

It is suggested that the status and action of their younger brother (Gerald Stanley Givens) makes it possible for the other minors to insist upon their right of title to the mortgaged and other lands conveyed by the sheriff.

In Winsett v. Winsett, 203 Ala. 373, 83 So. 117, the court held that: "Complainant in suit for partition by sale being a minor recently attaining majority, if he may recover his moiety of the property, the rights of the other joint tenants are saved from the operation of the statute of limitations or of the rule of repose by the infancy of the minor complainant."

This rule, however, has not been extended to a bill of review. Salter v. Odom, 240 Ala. 462, 199 So. 687; Gilb v. O'Neill, 225 Ala. 92, 142 So. 397, 85 A.L.R. 1526; Griffin Lumber Co. v. Neill, 240 Ala. 573, 200 So. 415, 134 A.L.R. 286. It follows that the rule of laches or implied waiver, arising from knowledge of existing conditions, and acquiescence therein by the other complainants (tenants in common) cross assigning error thereon, is applied, the three year statute of limitations after reaching majority barring all complainants here before the court save only Gerald Stanley Givens, who makes timely assertion of his rights. This rule was recognized and applied in Bailey v. Bond, 237 Ala. 59, 185 So. 411, where the facts varied from those here presented.

The exact question before us was settled in Mitchell v. Hardie, 84 Ala. 349, 4 So. 182, the decision being adverse to the insistence here made by cross assignment of error, to the effect that appellee Gerald Stanley Givens' bill for review and the granting of relief as to him does not open up the right of his brothers and sisters (who were infants at the time of the erroneous decree), and who failed to prosecute their bill for review within three years after expiration of their respective infancies. 30 C.J. Secundum, Equity, p. 1088, § 650.

The insistence of counsel for appellant is that the issues before the trial court in the original suit were whether the act of the guardian and administratrix in borrowing money to relieve the estate of tax liens and other charges and the giving of the mortgage as security for the loan were of such character as that they would have been authorized beforehand as beneficial to the estate of the minors and therefore should have been ratified. The court, after it had ruled on demurrers to the bill which challenged its equity, including the jurisdiction of the court, and after hearing the evidence, decided that the indebtedness incurred was for the benefit of the minors, that the making of the note and the giving of the mortgage would have been authorized by the court in the beginning upon application of the guardian and administratrix, that the mortgage should be foreclosed and that the persons who received the benefit of the loan, including the minors, should have to respond to the complainants for any deficiency so that justice might be done.

Counsel for appellant further insists that where a trustee or guardian changes the character of the property of an infant without authority of a court of equity, the court will nevertheless sanction and confirm the change if that would have been directed in the first place. The case of Warren v. Southall, 224 Ala. 653, 141 So. 632, 634, 38 Am.Rep. 13, quoted from the leading case of Goodman v. Winter, 64 Ala. 410, the established rule in Alabama as to the jurisdiction of a court of equity to deal with a change in character of real estate of an infant, and said: "The chancery court of Lauderdale county in 1928, having jurisdiction of the parties at interest, exercised a sound discretion for the benefit of the minors by authorizing the parties to borrow money from Southall with a mortgage on their lands. The same being in default is, by this bill, sought to be foreclosed in equity. The present appeal may not attack that proceeding collaterally." See also Christopher v. Chadwick, 223 Ala.

260, 135 So. 454; Warren v. Southall, 224 Ala. 653, 141 So. 632; Birmingham Trust & Savings Co. v. Strong, 239 Ala. 118, 194 So. 200; Denbo v. Sherrill, 241 Ala. 285, 2 So.2d 773. The last cited case relates to the general supervision of courts of equity over minors and their property to their best interest. Later decisions are: Higdon v. Higdon, 243 Ala. 571, 11 So.2d 140; First National Bank of Birmingham v. DeJernett, 229 Ala. 564, 159 So. 73.

What, then, of appellant's rights in the premises touching the error as to the deficiency judgment rendered against Gerald Stanley Givens as to the mortgage and deficiency judgment on the note he did not execute? It was executed by his guardian, secured by mortgage on his interest in lands held in common with his mother and brothers and sisters. The land in question was not their homestead. The money obtained was to discharge the state tax liens against all the estate of the father James Alexander Givens and was so employed. It thus touched the tax lien on the mortgaged lands that was foreclosed and purchased by mortgagee and also that levied upon under the deficiency judgment sold by the sheriff to the assignee of the said purchaser at mortgage foreclosure sale and its purchaser and assignee (A. C. Moulton) who stand in the shoes of Wiggins Estate Co., Inc. They are each respondents and now before this court as appellants assigning error.

We cannot know what the trial court, if it had been fully advised, would have provided in its decree to guard against the disastrous result to the infant owners of the land, had their guardian duly applied to the court for authority to execute the note and mortgage. Under these instruments, if there was liability, it was by way of statutes in force on their respective dates of June 26, 1926, and that of the decree of foreclosure and the deficiency judgment; viz, February 18, 1935, and January

21, 1936. The authority for a deficiency decree is by virtue of Code 1923, § 6652; Hamill v. McCalla, 228 Ala. 281, 153 So. 412; Flagg v. Florence Discount Co., 228 Ala. 153, 153 So. 177; Thompson v. Wilson, 224 Ala. 299, 140 So. 439; Qualls v. Union Central Ins. Co., 242 Ala. 619, 7 So.2d 558. The last mentioned section of the Code was not brought forward in the Code of 1940, but this court adopted Rule No. 119½ by order found in 240 Ala. p. xvi, to the effect of § 6652 of Code 1923, for deficiency judgment on foreclosure.

[6, 7] In this state taxes assessed against property create a personal liability of the owner and are a lien against the property duly assessed. Baines Bros. Inv. Co. v. Purdie, 180 Ala. 333, 60 So. 920; Perry County v. Selma, M. & M. R. Co., 58 Ala. 546. This lien is on the property of an infant as well as on an adult. In re Opinions of the Justices, 234 Ala. 358, 175 So. 690; State v. Alabama Educational Foundation, 231 Ala. 11, 163 So. 527. Being a lien on a taxpayer's property, must taxes be treated as a necessity, and an infant held to be liable therefor?

[8] The subject of "necessaries" in relation to the station and circumstances of infants is considered in the voluminous notes of the English and American decisions in 18 Am.St.Rep. p. 650 et seq., and the burden of proof of such necessaries is upon the one who asserts liability. The annotator observed: "The province of the court and the jury in solving the question of necessaries involves a proposition of considerable nicety, and one which is not always as clearly and definitely stated as it might be. The rule, having regard particularly to the latest cases, seems to be this: It is for the court to determine, as a matter of law, in the first place, whether the things supplied may fall within the general classes of necessaries, and if so, whether there is sufficient evidence to warrant the jury in finding that they are necessary. If either of

these preliminary inquiries be decided in the negative, it is the duty of the court to nonsuit the plaintiff who seeks to recover from the infant. If they be decided in the affirmative, it is then for the jury to determine whether, under all the circumstances, the things furnished were actually necessary to the position and condition of the infant, as well as their reasonable value, and whether the infant was already sufficiently supplied * * *."

In 14 R.C.L. p. 256, § 34, and p. 269, § 43, it is said: "According to the rule laid down by Lord Coke an infant may bind himself to pay for his meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction whereby he may profit himself afterwards, and this, generally speaking, has been accepted as the true doctrine. * * * Whatever is reasonably necessary for the proper and suitable maintenance of the infant in view of his means and prospects, and the customs of the social circle in which he moves and is likely to move, should be included. It has been said that articles of mere luxury or adornment cannot be included; but that useful articles, though of an expensive and luxurious character, may be included if they are reasonable in view of the infant's circumstances. It is for the judge to define the class and character of articles which may be held necessaries; and, if there is evidence creating a reasonable question, it is for the jury to say whether the particular articles sued for fall within the class. * * *."

We have given consideration to the text books and the numerous decisions touching the question of taxes and fail to find a full or satisfying discussion thereof. From this jurisdiction, however, it will be noted that Ragan v. Williams, 220 Ala. 590, 127 So. 190, 191, 68 A.L.R. 1182, contains the following statement: "* * * as to improvements of infants' lands the rule has been applied to labor, material, moneys for taxes, etc.; in society and

the home, extended to a bridal outfit and present to the bride, conveyance, servant and livery, mourning apparel, education and service of an attorney. 31 C.J. 1078 * * *."

In 31 C.J. p. 1078, § 175, it is observed that, "The payment of taxes on the property of infants is a necessary," citing Horstmeyer v. Connors, 56 Mo.App. 115, and in that case it is held: "Where special taxes on a building which belongs to infants and adults in common, and is occupied by the infants as a homestead, are paid by a third person at the request of all the owners, the infants are liable for the entire amount; but each *infant is liable only for his own share of the general taxes* so paid, since general taxes are apportionable under the statute." [Italics supplied.]

It will be noted that this last cited case dealt with taxes on an infant's homestead and not taxes in general, and this case has not since been commented upon.

Illuminating notes by Judge Freeman in 18 Am.St.Rep. pp. 569-724, are to the case of Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, considering the extent of an infant's liability. The text of the decision annotated is to the effect that an infant may repudiate a contract executed during minority without returning the consideration, and that this rule applies only where the infant has the property or consideration at the time he attains full age. The annotator begins with the language of Chief Justice Parsons in Baker v. Lovett, 6 Mass. 78, 80, 4 Am.Dec. 88, declaring, " 'The law, therefore, protects their weakness and imbecility so far as to allow them to avoid all their contracts by which they may be injured. But in favor of infants, they are bound by all reasonable contracts for their maintenance and education, and also by all acts which they are obliged by law to do.' * * *."

In Stewart's Adm'r v. Stewart's Heirs, 31 Ala. 207, 213, and in Gilliland v. Fenn, 90 Ala. 230, 237, 239, 8 So.

15, 9 L.R.A. 413, the rule of Elliott v. Horn, 10 Ala. 348, 354, 44 Am.Dec. 488, was followed by Judge Stone. See also Wilson v. Sheppard, 28 Ala. 623, and Sims v. Gunter, 201 Ala. 286, 288, 78 So. 62, 64. In Manning v. Johnson, 26 Ala. 446, 451, 62 Am.Dec. 732, Chief Justice Chilton said: 'It is now the settled doctrine, that the deed of an infant is not void, but voidable only.' Reeves' Dom. Rel., p. 250, et seq.: Zouch v. Parsons, 3 Burr. 1794; Elliott v. Horn, 10 Ala. 348-354, 44 Am.Dec. 488; Weaver v. Jones, 24 Ala. 420."

The subject of statutory regulation is discussed at great length from the standpoint of English and American decisions affecting deeds of conveyance; purchase of and mortgages on infant's land, and leases of real property. Under the latter subject, it is declared: "In regard to leases made to infants, it has been held in this country that such a lease was not void, but voidable only, and therefore a third person could not attack it on the ground of infancy, in an action in which the lease was drawn into question: Griffith v. Schwenderman, 27 Mo. 412; and again where infants gave written agreement to pay rent, a plea of infancy to an action thereon was good: Flexner v. Dickerson, 72 Ala. 318."

In Flexner v. Dickerson, 72 Ala. 318, 322, it is declared by Mr. Justice Somerville, that: "1. Infants are not liable on any of their contracts, excepting only for *necessaries*, —the sum to be recovered in such cases being the just value of the *necessaries*, and not what was agreed to be paid. 2. The only act which an infant is legally incapacitated to perform, is the *appointment of an attorney*. 3. *All other contracts* of infants, whether executory or executed, may be avoided or ratified at the election of the infant, being considered *voidable, and not absolutely void*. * * *"

[9] If tax on an infant's property is a necessary, may he borrow money to pay the same and make a binding

contract supervised by the court? When his mortgage for money borrowed for *payment of taxes as a necessity* is being enforced in equity and he is a party and represented by a guardian ad litem, the court should, and presumably did, look after the interest of the infant. In such a proceeding the court had the right to enforce the payment of the mortgage by its foreclosure and to render a deficiency decree under its supervision, if that consideration was money borrowed and discharged a tax lien on the infant's property, assuming that to be *a necessary.* 31 C.J. 1078, note 11; Ragan v. Williams, 220 Ala. 590, 127 So. 190, 68 A.L.R. 1182; Ex parte McFerren, 184 Ala. 223, 63 So. 159, 47 L.R.A.,N.S., 543, Ann. Cas.1915B, 672, was recovery of rents paid and infant received no benefit. All general authorities are collected in 68 A.L.R. 1182; 47 L.R.A.,N.S., 543; Brasher v. Grayson, 217 Ala. 674, 117 So. 301, a dwelling house which was rented.

We are thus forced to a more careful consideration of taxes as a necessary of an infant than has been done by this court in Ragan v. Williams, supra. The general decisions touching leases and mortgages recognize a distinction between infant's home or homestead and general properties on which the taxes accrue. The best case or the more consistent case before us is Horstmeyer v. Connors, 56 Mo.App. 115, to the effect that the infant's contract to pay for repairs of a building occupied as a homestead is not valid as a contract for necessaries but is otherwise as to outlays for taxes where the property so occupied belongs to the infants and to adults in common and a third party at the request of one of the owners pays taxes on it which are due and subject to draw penalties; that the liability of the infant owners will result from such payments if made at the request of an adult owner only; that for the special taxes thus paid the infant owners are answerable for their entire amount, "but the liability of each infant owner for general taxes so paid is limited to his own share" of them since general

taxes are apportionable under the statutes of Missouri. The Presiding Justice quotes from Lord Mansfield in Zouch v. Parsons, 3 Burr. 1801, as follows:

"'Generally, whatsoever an infant is *bound to do by law* the same shall bind him, albeit he doth it *without* suit by law;' and, again, 'to what end should the law permit a minor to avoid an act, which, in *any* way, through *any* mean, by *any* jurisdiction, he might be compelled to *do over again* after it was undone? It would be assisting him to vex and injure *others*, without the least benefit to *himself.*'

"But, while we fully recognize the liability of the infants upon their respective requests to become answerable for their *respective shares* of the taxes paid, no request can make either of them answerable beyond his share, and *in solido* for the whole amount of the taxes paid. * * * This reasoning does not apply to the special tax bill, which, if paid at all, was bound to be paid as an entirety."

"* * * Keeping these provisions in view, we think the justice of the case is best subserved by permitting the defendant in error, if he so elects, to remit in this court his recovery against the minor defendants, except the amount of $55.35, being the amount of the special tax bill and interest thereon. * * *."

There is analogy in this case as to the chancery court dealing with taxes of minors.

[10, 11] Under the statutes and constructions thereof, we hold that taxes against a minor's property are an obligation the law requires him to pay and will be enforced by the sale of his property or procedure in court for enforcement thereof. Thus we hold that taxes are necessaries of a minor as was held in Ragan v. Williams, 220 Ala. 590, 127 So. 190, 68 A.L.R. 1182.

[12, 13] Adverting to the facts as found by the circuit court in equity, it is apparent that the principal and interest on the indebtedness to pay taxes and the attorneys' fee due under the note and mortgage amounted to $2,737.58. The report of the sale confirmed the purchase of the mortgaged lands by Wiggins Estate Company, Inc., for the sum of $2,000. Deducting the latter amount from the former, the balance is $737.58; and of this amount $349.62 was for attorneys' fee, for which the minor is not liable. When the attorneys' fee of $349.62 is deducted from the balance of $737.58, it results that the amount borrowed for the payment of taxes due by Gerald Stanley Givens and the other heirs is $387.96. But Gerald Stanley Givens is liable for only one-eighth of this amount as his aliquot part of the debt for money to pay taxes or $48.49. It is apparent by inspection of this record that this sum he was not permitted to pay at the time of the foreclosure of the mortgage or provision for deficiency judgment.

The deficiency judgment is therefore excessive as against Gerald Stanley Givens as to the entire amount thereof, except said sum of $48.49. It therefore shows an error on its face as to him and such error operates to vacate the sale under execution issued on that judgment insofar as he is concerned. But relief will not be granted him on that account except upon condition that he shall do equity by paying into the registry of the circuit court in equity said sum of $48.49 within thirty days from this date. If he shall pay said sum without interest, as above authorized, the sale of his interest in the 1,650 acres under execution for the deficiency shall stand vacated and held for naught; and the register shall then so endorse the same on the margin of the record of said sheriff's deed. But, in the event he shall fail to pay said sum as above authorized, all relief shall be denied him and his bill dismissed at his cost. If he shall so comply, the register will issue process as is necessary to

put him in possession of said one-eighth interest in said 1,650 acres jointly with the said C. A. Moulton as owner of the other seven-eighths interest. And if he shall so comply all costs of this cause are taxed against C. A. Moulton; but if he shall not comply, all costs shall be taxed against the said Gerald Stanley Givens.

It is further decreed that this cause be affirmed on the cross-assignments of error.

Corrected and affirmed.

All Justices concur.

* * * *

GIVENS v. MOLL et al.

No. 12520.

United States Court of Appeals
Fifth Circuit.

Nov. 15, 1949.

Rehearing Denied Jan. 12, 1950.

Charles A. Givens sued Herman H. Moll and others to set aside a judgment of a state court, for an accounting, and other relief.

The United States District Court for the Southern District of Alabama, John McDuffie, J., dismissed suit for lack of jurisdiction, and plaintiff appealed.

The Court of Appeals, Hutcheson, Circuit Judge, affirmed judgment, holding that complaint showed lack of diversity of citizenship, and failed to allege a federal question.

1. *Courts*—308, 317

Federal district court properly dismissed suit for want of jurisdiction on ground of diversity of citizenship where complaint did not claim or suggest requisite diversity,

and named a co-citizen of state with plaintiff as a "real respondent", and named as nominal parties defendant, but in fact real parties plaintiff, plaintiff's co-claimants, who were co-citizens of state with those named by plaintiff as real defendants.

2. *Courts*—282.2(1)

Charge that defendants by obtaining judgments in state court thus used state power to deprive plaintiff and co-claimants of property without due process of law did not confer original jurisdiction upon federal district court of suit to set aside a judgment of state court, and for other relief, on ground that a federal question was involved. U.S.C.A.Const. Amend. 14.

3. *Courts*—282.2(25)

The claim that a judgment of state court is erroneous raises no federal question on which jurisdiction of federal courts can be based.

4. *Courts*—282.2(1)

Charged acts of a lawyer were not acts of a state, so that suit against lawyer for wrongs lawyer allegedly did depriving plaintiff and co-claimants of property without due process of law did not present federal question conferring original jurisdiction upon federal district court. U.S.C.A.Const. Amend. 14.

J. Terry Reynolds, Jr., Mobile, Ala., Henry C. Vosbein, New Orleans, La., for appellant.

Hugh M. Caffey, Leon G. Brooks, Brewton, Ala., for appellees.

Before HUTCHESON, McCORD, and RUSSELL, Circuit Judges.

HUTCHESON, Circuit Judge.

Appealing from a judgment dismissing his suit for

want of jurisdiction, appellant, a citizen of Florida, is here insisting that his complaint showed both the requisite diversity of citizenship and the existence of a federal question, and the judgment must be reversed.

[1] We cannot at all agree. Nowhere in the course of the lengthy complaint is the requisite diversity claimed or even suggested.[1] On the contrary, the complaint, in naming as a "real respondent" W. E. Duggan, a co-citizen with plaintiff of Florida, on its face deprives the suit of the requisite diversity. In addition, it names as nominal parties defendant[2] but in fact real parties plaintiff, his brothers and sisters, co-heirs with him and co-claimants in the cause of action, all of whom are co-citizens of Alabama with Caffey et al., named by plaintiff as the real defendants.

When it comes to the federal question ground of jurisdiction, that the suit arises under the Constitution and laws of the United States, while it is clear that plaintiff's reliance for jurisdiction is on that ground, it is equally clear that the complaint signally fails to present such a ground. The only reference in the long complaint, with its mass of attached exhibits, to either the Federal Constitution or the statutes is the reference in paragraph 1, on page 3 of the transcript: "* * * depriving your complainant of his lawful inheritance without due process

---

[1] Cf. 35 C.J.S., Federal Courts, § 77, p. 905; Chase Nat. Bank v. Citizens Gas Co., 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47; Alexander v. Hillman, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192; Dawson v. Columbia Ave. Savings Fund, 197 U.S. 178, 25 S.Ct. 420, 49 L.Ed. 713.

[2] The complaint, after naming as respondents heirs and co-heirs with complainant of his deceased father, James Givens, proceeds: "The foregoing named respondents are so made in this cause in order to avoid delay in the bringing of this action by appearing as complainants, who, upon motion made by them to be joined as co-complainants in this cause, your complainant would embrace as conducive to complete equity."

of law and in violation of the Fourteenth Amendment of the Constitution of the United States, to-wit: 'Nor shall any State deprive any person of life, liberty or property, without due process of law; not deny any person within its jurisdiction the equal protection of the Laws."

Assuming, without deciding, that this generalization, if supported by pleaded facts, would be a sufficient claim of federal jurisdiction on the ground of a federal question, we find no allegation of fact whatever which shows or tends to show the existence of a federal question in this cause.

Stripped of the involvements, the intricacies, the particularities, the redundancies with which the complaint abounds, what it comes down at last to is a claim: that Caffey, as solicitor and advisor of the Givens Estate, aided and abetted by other defendants named and unnamed, by and with the aid of court proceedings and court judgments in Alabama,[3] conceived, engineered, and carried out a scheme to defraud the James Alexander Givens Estate and plaintiff and his co-heirs, the owners thereof, and that as a result of the taking and foreclosure of mortgages and other acts and proceedings in and out of court, the defendants have wronged plaintiff and his co-heirs.

The prayer is for an accounting and for an injunction against waste, for restoration of the title to the estate of Givens, for the setting aside of the judgment of foreclosure and that a special administrator be appointed to bring about a division in kind among the rightful heirs of James Givens.

Here claiming: that Duggan is neither an indispensable nor a necessary party and instead of dismissing the complaint for his joinder, he should be dismissed from it;

---

[3] Wiggins Est. Co. v. Jeffrey, 246 Ala. 183, 19 So.2d 769.

and keeping silent altogether about his co-heirs and co-claimants, co-citizens with the Alabama defendants, the appellant puts his main reliance on his contention that the suit involves a federal question under the 14th Amendment, and that by state action violating the due process clause, he has been deprived of his rights. In support of this contention, he urges upon us: (1) that his complaint is a charge that the defendants by obtaining judgments in the state court have thus used state power to deprive him and his co-claimants of property without due process of law; and (2) that it is a charge that some of the defendants are lawyers and, therefore, officers of the state courts, and as such they must be regarded as officers and instrumentalities of the state and their actions in deprivation of plaintiff's property as state action.

[2, 3] That there is no merit whatever in either of these contentions, the most casual examination of the authorities and a consideration of the fantastic results which would follow maintaining them, will at once make clear. If appellant were right, every case brought to judgment in a state court could be made the basis of a suit in the federal court upon the ground of a federal question by the mere allegation that the state court judgment was obtained in violation of due process. That this is not, it cannot be, the law, is as clear upon principle as it is upon authority. It is well settled that federal courts are not competent or authorized to entertain original suits to review state court action on the ground that a state court's judgment is erroneous. It is particularly well settled that the claim that a state court's judgment is erroneous raises no federal question on which the jurisdiction of federal courts can be based.[4]

---

[4] 35 C.J.S., 836, Federal Courts, § 28; Central Land Co. v. Laidley, 159 U.S. 103, 16 S.Ct. 80, 40 L.Ed. 91; Tracy v. Ginzberg, 205 U.S. 170, 27 S.Ct. 461, 51 L.Ed. 755; Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268.

[4] Its second point, that the acts of a lawyer are the acts of a state so that suits against him for wrongs it is claimed that he has done present federal questions giving rise to federal jurisdiction is, if anything, more fantastic. The judgment dismissing the complaint was right. It is

Affirmed.

ROSE E. GIVENS, Adm'x, et al.

v.

C. A. MOULTON.

3 Div. 734.

Supreme Court of Alabama.

March 22, 1956.

Rehearing Denied and Petition for Certiorari Dismissed June 14, 1956.

Suit in equity was brought to quiet title to realty, and respondents filed a cross-bill. The Circuit Court of Escambia County, T. W. Thaggard, Special Judge, entered a decree adverse to the respondents, and they appealed. The Supreme Court held that where tenants in common did not exercise their right to redeem first tract of realty after foreclosure of mortgage thereon, so that the right was lost, and purchaser at the sale thereafter sold and conveyed the tract to grantee, who had allegedly been a tenant in common because he had acquired the interest of one of the tenants in common prior to the foreclosure sale, the purchase of the realty by the grantee was not a redemption by a tenant in common for the benefit of all tenants in common, since there was no cotenancy at time grantee purchased the tract, and that the purchase by a tenant in common of the interests of his cotenants in second tract of realty under sheriff's deed, did not

inure to the benefit of the cotenants whose interests were sold and who alone owed the debt for which the tract was sold.

Affirmed.

1. *Tenancy in Common*—19(4)

Where tenants in common did not exercise their right to redeem first tract of realty after foreclosure of mortgage thereon, so that the right was lost, and purchaser at the sale thereafter sold and conveyed the tract to grantee, who had allegedly been a tenant in common because he had acquired the interest of one of the tenants in common prior to the foreclosure sale, the purchase of the realty by the grantee was not a redemption by a tenant in common for the benefit of all tenants in common, since there was no cotenancy at time grantee purchased the tract.

2. *Tenancy In Common*—19(3)

A tenant in common may purchase the interests of his contenants at a partition, execution, or other judicial sale of such interests, and acquire their rights for his sole benefit, where judgment or lien on which the sale was had was only on the undivided share of his cotenant.

3. *Tenancy in Common*—19(3)

The purchase by a tenant in common of the interests of his cotenants in second tract of realty under sheriff's deed did not inure to the benefit of the cotenants whose interests were sold and who alone owed the debt for which the tract was sold.

Windell C. Owens, Monroeville, and Hugh Rozelle and Joseph R. Tucker, Atmore, for appellants.

Leon G. Brooks, Brewton, for appellee.

PER CURIAM.

This appeal is by Rose E. Givens as administratrix of the estate of James A. Givens, deceased, and by Charles A. Givens, Robert H. Givens and Susie Kate Tatum from a final decree in equity, wherein C. A. Moulton is complainant, and appellants together with Gerald Stanley Givens are respondents and cross complainants. Gerald Stanley Givens did not appeal nor join in the assignments of error. The other heirs of James A. Givens are respondents in the bill, but cross complainants claim to have acquired those interests in the land involved, except that of Louise Givens claimed by C. A. Moulton and the interest of Rose Marie Givens Jeffery.

This litigation has been in court since August 7, 1937, when an original bill of complaint was filed by C. A. Moulton against the heirs of James A. Givens, deceased, seeking a sale of certain land owned by him at the time of his death. He died in 1921 and left surviving a widow Rose E. Givens, three adult children and six minor children. The adult children were Bertha Givens Moll (wife of Herman Moll), Angelyne Givens Taylor and Charles A. Givens; the minors were Rose Marie Givens (Jeffery), Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens (Tatum), Gerald Stanley Givens and Louise Givens (Jones). Rose E. Givens was appointed administratrix of the estate and guardian of the minors.

On June 26, 1926 Rose E. Givens, individually and as administratrix and guardian, together with the three adult children, borrowed money from the Wiggins Estate Co., Inc., to pay taxes and expenses, and executed a mortgage covering a tract of land which was a part of that owned by James A. Givens at the time of his death. We shall designate this tract as parcel "A".

On August 14, 1928 one of the heirs Louise Givens (Jones) executed a mortgage on her 1/9th interest in all the land, both parcels, to complainant and one C. P.

Smith. This mortgage was foreclosed on October 19, 1929, at which time complainant and C. P. Smith became the purchasers.

On February 25, 1930 a bill in equity was filed by the Wiggins Estate Co., Inc., to foreclose the mortgage which it had taken on June 26, 1926. That bill made as parties all the heirs of James A. Givens and his widow, individually and as administratrix and as guardian, including Louise Givens, although at that time she had no interest in the land, except a statutory right of redemption, for her interest was then owned (subject to that right) by complainant and C. P. Smith who were not made parties to the suit. That suit involved parcel "A" only, since parcel "B" was not covered by the mortgage. On January 21, 1936 a decree was rendered holding all the heirs, except Louise Givens, personally liable for the debt (being for necessaries). The decree ascertained the amount due and ordered a foreclosure of the mortgage. The debt not having been paid the land was sold, as ordered, and Wiggins Estate Co., Inc., became the purchaser at a sum less than the debt. On April 21, 1936 a deficiency judgment was rendered for the balance of the mortgage debt left unpaid after crediting the purchase price. That decree did not include Louise Givens who at the time had no interest in the land sold under foreclosure of the mortgage as her statutory right of redemption had expired. On July 10, 1937 complainant Moulton acquired the interest of C. P. Smith in said 1/9th interest of Louise Givens.

As said above, the original bill in the instant case was filed by Moulton on August 7, 1937. He then owned 1/9th interest in both parcels "A" and "B". He sought a sale for division of both parcels, and made the Wiggins Estate Co. a party. On May 10, 1938 the Wiggins Estate Co. conveyed its interest in parcel "A" to complainant Moulton. On August 1, 1938 an execution was issued on

the deficiency judgment against the heirs of James A. Givens, parties to the foreclosure suit but not including Louise Givens (Jones). The execution was levied on parcel "B" as the property of defendants in the execution. There was a sale of it under that levy and complainant Moulton became the purchaser, and a sheriff's deed was executed to him on October 10, 1938. The deficiency judgment had been assigned to him by Wiggins Estate Co.

On September 13, 1940 complainant Moulton filed an amended bill in the instant case, which changed its purpose, alleging that he was the owner of both parcels "A" and "B" and in the peaceable possession. The amended bill contained the necessary allegations to comply with the statute to quiet the title, and called upon all the heirs, who were already parties, to assert their claim. This bill lay inactive pending other proceedings which we shall now relate.

On August 26, 1941 a bill of complaint in the nature of a bill of review, under Equity Rule 66, was filed in equity by Rose Marie Givens (Jeffery), Lillian Mozelle Givens (Greer), Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens against Wiggins Estate Co. and C. A. Moulton. It prayed that the decree rendered in the foreclosure suit of January 21, 1936, and the deficiency judgment rendered April 21, 1936 be reviewed, reversed, annulled and set aside: also that the deed executed on April 29, 1936 by the register to the Wiggins Estate Co., and the deed from Wiggins Estate Co. to C. A. Moulton dated May 10, 1938, together with the deed of October 10, 1938 from the sheriff to C. A. Moulton be cancelled and held for naught. Demurrers were separately filed to that bill by C. A. Moulton and Wiggins Estate Co. on the ground, among others, that the right to such a bill in the nature of a bill of review was barred by the three-year limitations of Equity Rule 66. The court sustained the

demurrer as to Rose Marie Givens Jeffery, Lillian Mozelle Givens Greer, Robert Henley Givens and Susie Kate Givens Owens, and overruled it as to Gerald Stanley Givens. Thereupon, on June 12, 1943 the circuit court decreed that the land involved in that suit, consisting of both parcels "A" and "B", was at that time jointly owned by complainant Gerald Stanley Givens and C. A. Moulton the respondent in that suit. That Gerald Stanley Givens was the owner of "an undivided 1/8th interest and that C. A. Moulton owned an undivided 7/8ths interest". It reversed, annulled, set aside and held for naught as to Gerald Stanley Givens the decrees of that court rendered January 21, 1936 and April 21, 1936, respectively. It also annulled and declared void as to Gerald Stanley Givens the deed executed by the register to Wiggins Estate Co. on April 29, 1936, and the deed from Wiggins Estate Co. to C. A. Moulton dated May 10, 1938, and the deed from the sheriff to W. A. Moulton dated October 10, 1938.

On appeal taken by Wiggins Estate Co. and C. A. Moulton from that decree, Wiggins Estate Co. v. Jeffery, 246 Ala. 183, 19 So.2d 769, 776, this Court held that the foreclosure proceedings were valid affecting parcel "A" (1,684 acres), and confirmed in Moulton the "1/8th interest" of Gerald Stanley Givens in that parcel, as well as the interest of all the others. And also held that as to parcel "B" (1,650 acres) the deficiency judgment of the circuit court was corrected and modified so as to decree that the deficiency judgment is excessive as against Gerald Stanley Givens as to the entire amount thereof, except the sum of $48.49 which operates to vacate the sale under execution issued on the judgment insofar as Gerald Stanley Givens is concerned; "but relief will not be granted him on that account except upon condition that he shall do equity by paying into the registry of the circuit court in equity said sum of $48.49 within thirty days

from this date. If he shall pay said sum without interest, as above authorized, the sale of his interest in the 1,650 acres under execution for the deficiency shall stand vacated and held for naught".

The instant suit was tried on the amended bill filed September 13, 1940, and remained inactive until after the litigation referred to above had terminated. Many answers and cross bills were filed, most of them being impertinent, but the rulings on them were not assigned as error. On September 26, 1953 a rewritten answer and cross bill was filed after demurrer had been sustained to the one previously filed. Demurrer was also interposed to the rewritten answer and cross bill, but no ruling had on it. Another answer and cross bill was filed December 1, 1953, to which the demurrer was refiled. On February 8, 1954 a decree was rendered sustaining the demurrer to the "cross bill", without designation. The assignment of error (No. 3) in that respect is to the ruling on demurrer to the "cross bill as amended on September 26, 1953". There is no other assignment of error to rulings on demurrer.

The cause came on for hearing on final decree on December 6, 1954. Testimony was taken orally in open court. The decree recites the case was submitted on bill of complaint as last amended May 16, 1951 (we find no such amended bill in the record), and the answer of defendants as last amended December 2, 1953 (that probably refers to the amendment filed December 1, 1953). The final decree on that submission was that C. A. Moulton, the complainant, owned "an undivided 7/8ths interest" and Gerald Stanley Givens owned "an undivided 1/8th interest" in the land described by government numbers which appears to be parcel "B", with no reference to the balance of the land, or parcel "A". Neither Moulton nor Gerald Stanley Givens has appealed or assigned errors. Doubtless the decree should have given 8/9ths

to Moulton and 1/9th to Gerald Stanley Givens; but we shall not undertake to modify it to that extent because the parties are not complaining.

We shall treat the assignment of error as intending to refer to the decree sustaining the demurrer to the cross bill filed December 1, 1953. That cross bill seeks a declaration of the court "that cross complainants, along with Rose Marie Givens Jeffery, are the owners of 8/9ths undivided interest in the lands identified as parcels A and B in this amended cross bill, and that cross respondent C. A. Moulton is the owner of 1/9th undivided interest in said land," and for an accounting on that basis. The basis of that contention is thus expressed in the cross bill: "that said purchases by the said C. A. Moulton were redemptions from mortgage foreclosure sale * * * and that said redemptions were made for the joint benefit of all the tenants in common, including the said C. A. Moulton, and that said redemptions were made before the time for redemption had expired". They further allege that cross complainants "have since 1937 been continually ready and willing to contribute their respective pro rata share of the cost of these mortgage and tax sale redemptions made by C. A. Moulton and that the cross complainants are ready and willing to do equity in this cause".

As to the cross bill the only question is on the demurrer to it. We must look to it along with the bill for the full import of the contention on which the relief is sought. The cross bill is completely rewritten, so we will not refer to those previously written in passing on the demurrer to the one now under consideration.

The first contention is that when C. A. Moulton received a deed from Wiggins Estate Co. on May 10, 1938, he was a tenant in common with all the heirs of James A. Givens, except Louise Givens whose interest he had acquired and which made him a tenant in common; and, therefore,

that his purchase was in the nature of a redemption by one tenant in common or was the purchase of an outstanding interest.

[1] When the foreclosure suit was filed February 25, 1930 Louise Givens was made a party, but she had only a statutory right of redemption of her interest held by Moulton and Smith under a foreclosure of a mortgage to them. The foreclosure proceedings resulting in a sale to Wiggins Estate Co. purported to include her interest. That sale was made more than two years before Wiggins Estate Co. conveyed it to Moulton. Regardless of the effect of that foreclosure on Moulton's interest which he had acquired from Louise Givens, it served to pass the interest of all the other heirs to Wiggins Estate Co. subject only to their statutory right of redemption. That right was not attempted to be effected by any of them and was lost. Therefore, the foreclosure proceeding which was validated on appeal in the bill of review, served to cut them off of any interest in parcel "A", and they ceased to be tenants in common with Moulton. (That included Gerald Stanley Givens.) Coleman v. Coleman, 173 Ala. 282, 55 So. 827; Winsett v. Winsett, 203 Ala. 373, 83 So. 117; Alabama Machinery & Supply Co. v. Baker, 223 Ala. 230, 135 So. 171; Gilb v. O'Neill, 225 Ala. 92, 142 So. 397, 85 A.L.R. 1526. So that, whether or not Moulton was foreclosed by that suit from exercising the equity of redemption when he purchased from Wiggins Estate Co., there was no cotenancy with the other heirs then existing. If it were an exercise by Moulton of his equity of redemption, it was for his personal benefit only.

We now proceed to the purchase by Moulton at the sheriff's sale of parcel "B" on October 10, 1938. That sale was on an execution under a deficiency judgment rendered April 21, 1936 in the foreclosure suit against all the heirs of James A. Givens liable for the mortgage debt, except Louise Givens. There was no lien created by that

suit on parcel "B", which was not included in the mortgage foreclosure suit. There was no lien on it except by virtue of the execution and levy on it as the property of defendants in the execution, which did not include Louise Givens. She had no interest in the land subsequent to October 19, 1929 when her mortgage to Moulton and Smith was foreclosed, except for the two years in which to exercise the statutory right of redemption which was not undertaken. Therefore her interest in the land had been completely lost to her at the time that execution was issued and levied. The sale under it did not affect Moulton's interest in parcel "B" acquired from Louise Givens. So that the judgment and lien on which the sale was had was only on the undivided share of Moulton's cotenants; and that was what Moulton purchased at the sheriff's sale.

[2] The principle was thus stated in 86 C.J.S., Tenancy in Common, § 60, p. 427: "A tenant in common may purchase the interests of his cotenants at a partition, *execution*, or other judicial *sale of such interests*, and acquire their *rights for his sole benefit*, where the judgment or lien on which the sale was had *was only on the undivided share of his cotenant*". And in 14 Am.Jur. 119, section 50, it is said: "The courts are agreed that when the common property is *sold for the satisfaction of a debt payable by only one of the tenants*, his *cotenant or cotenants* may purchase the title in the same manner *as may a stranger*". (Italics supplied.)

[3] Therefore, the purchase by Moulton of the interest of his cotenants in parcel "B" under the sheriff's deed of October 10, 1938, did not inure to the benefit of the very persons whose interests were sold and who alone owed the debt for which the property was sold. Moulton never owed the debt and his interest in the land was never subject to sale under the execution.

We do not reach the question whether these cross complainants acted with the haste required by law and did what was necessary to obtain the benefit of such a right if it had existed. See Kelly v. Kelly, 250 Ala. 364 (12), and cases cited at page 670, 35 So.2d 686, 690.

The court sustained the demurrer to the cross bill without error. That means the cross bill made no showing as to a present interest of these appellants in either parcel of land involved, and therefore the final decree declaring that parcel "B" was owned by Moulton and Gerald Stanley Givens was without error insofar as appellants are concerned, as was held in the review proceedings referred to above.

The decree should be affirmed.

The foregoing opinion was prepared by FOSTER, Supernumerary Justice of this Court, while serving on it at the request of the Chief Justice under authority of Title 13, § 32, Code, and was adopted by the Court as its opinion.

Affirmed.

LIVINGSTON, C. J., and LAWSON, GOODWYN and MERRILL, JJ., concur.

THE SUPREME COURT OF ALABAMA

THURSDAY, MARCH 22, 1956

THE COURT MET PURSUANT TO ADJOURNMENT PRESENT:

CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, GOODWYN, AND MERRILL.

3rd Div. 734

Rose E. Givens, Individually and as Administratrix of the Estate of James A. Givens, Deceased: Charles A. Givens, Robert H. Givens, and Susie Kate Tatum

vs.

C. A. Moulton

ESCAMBIA CIRCUIT COURT, IN EQUITY

No. 1826

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court,

IT IS CONSIDERED that in the record and proceedings of the Circuit Court, In Equity, there is no error in the decree sustaining the demurrer to the cross-bill. That means the cross-bill made no showing as to the present interest of the appellants in either parcel of land involved, and therefore the final decree declaring that Parcel "B" was owned by C. A. Moulton and Gerald Stanley Givens was without error in so far as appellants are concerned, as was held in the review proceedings referred to in the opinion of this Court.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED that the decree of the Circuit Court, In Equity, be and the same is hereby affirmed.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the costs of appeal of this Court and of the Circuit Court, In Equity, be and the same are hereby taxed against the appellants: Rose E. Givens, Individually and as Administratrix of the Estate of James A. Givens, Deceased, Charles A. Givens; Robert H. Givens, and Susie Kate Tatum, and P. R. Barnhill, Greley McGhee, Calvin W. McGhee, Grady Franklin, A. S. Hart, M. L. Hodge and B. R. Rolin, sureties on the appeal bond.

And it appearing that said parties, with the exception of Rose E. Givens, Robert H. Givens and Susie Kate Tatum, have waived their rights of exemption under the laws of Alabama, let execution issue accordingly.

THE SUPREME COURT OF ALABAMA

THURSDAY, JUNE 14, 1956

THE COURT MET PURSUANT TO ADJOURNMENT PRESENT:

CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, STAKELY, GOODWYN, MERRILL AND SPANN

3rd Div. 734

Rose E. Givens, Individually, and as Administratrix of the Estate of James A. Givens, Deceased: Charles A. Givens: Robert H. Givens: and Susie Kate Tatum

vs.

C. A. Moulton

ESCAMBIA CIRCUIT COURT, IN EQUITY

No. 1826

IT IS ORDERED, that the application for rehearing filed by the appellants in this cause on April 4, 1956,

after being duly examined and considered by the Court, be and the same is hereby overruled.

IT IS FURTHER ORDERED that the Petition for Writ of Certiorari filed by the appellants in this cause on May 31, 1956, after being duly examined and considered by the Court, be and the same is hereby dismissed.

• • • •

THE SUPREME COURT OF ALABAMA

THURSDAY, OCTOBER 4, 1956

THE COURT MET PURSUANT TO ADJOURNMENT PRESENT:

CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, STAKELY, GOODWYN, MERRILL AND SPANN.

3 Div. 782

EX PARTE ROSE E. GIVENS, ET AL.,
PETITION FOR WRIT OF ERROR CORAM NOBIS

(In re: Rose E. Givens et al. v. C. A. Moulton)
Escambia Circuit Court, In Equity

Come the Petitioners, Rose E. Givens, et al., by Attorneys, and the Petition for Writ of Error Coram Nobis being submitted and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the Petition for Writ of Error Coram Nobis be and the same is hereby denied at the cost of the Petitioners, for which costs let execution issue accordingly.

(No opinion written)

STATE OF ALABAMA)
ESCAMBIA COUNTY)

Before me, the undersigned authority in and for said County and State, personally appeared J. F. Vickery,

who is known to me, and who, being first duly sworn, deposes and says:

I am the Register of the Escambia County Circuit Court, in Equity and as such register I prepared the transcript in the case of ROSE E. GIVENS, etals, vs. C. A. MOULTON, which was appealed to the Supreme Court of Alabama as case number 734, Third Division, from the Circuit Court of Escambia County, Alabama.

The transcript and the supplement to the transcript which I prepared and forwarded to the Supreme Court contained all the papers and documents relating to the case which I could find in my office. However, since the supplement was prepared and forwarded to the Supreme Court, I have found in my office two pleadings which should have been included in the transcript. These pleadings include an amended cross-bill filed by Gerald S. Givens on June 19, 1951 and another amended cross-bill, including numerous exhibits, filed by Gerald S. Givens on August 29, 1951. These papers were not in the files when the original transcript or supplement to the transcript were prepared.

/s/ J. F. ~~Unberry~~ Vickery

Register, Circuit Court of
Escambia County, Alabama

Sworn to and subscribed before me this 15th day of September, 1956.

/s/ Reo Kirkland
Judge of Probate
Escambia County, Ala.

IN THE SUPREME COURT OF
THE UNITED STATES

ROSE E. GIVENS, etals,
APPELLANT

VS

C. A. MOULTON
APPELLEE

To the Honorable the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Comes your Petitioner Charles A. Givens and petitions this Honorable Court for additional time in which to complete the record in the cause of Givens vs Moulton et al, and as grounds for said petition, shows unto this Honorable Court as follows: That according to his knowledge, information, recollection and belief the following are true and correct statements of fact as to the record in the above styled cause:

1. That the Register in Chancery of the 21st Judicial Circuit, Escambia County, Alabama by affidavit certified to the Supreme Court of Alabama that certain documents in the said cause were removed from the Escambia County Court file, by parties unknown, and that of these documents which had been removed, certain documents were returned to the file of the said Circuit Court. That the said Register in Chancery failed to submit the documents referred to in his certificate, and that due to the press of time, the said Register in Chancery will be unable, and it is impossible for said documents to be properly prepared on transcript paper and certified through the Supreme Court of Alabama to the Supreme Court of the United States by November 10, 1956.

2. Your Petitioner, herein, under affidavit in a petition to the Supreme Court of Alabama for a writ of

error Coram Nobis set forth the said certificate noted above from the Register in Chancery of Escambia County, Alabama, thereby showing the said Register in Chancery was unable to submit the records set out in the petition.

3. And whereas the transcript of record in the Wiggins Estate Company vs Jeffrey et al (1944) 19 So. 2d 769, is in the file of the Circuit Court of Escambia County Alabama and a proper transcript can not be made from said record by the Clerk of said Court as a part of the transcript of record and certified through the Supreme Court of Alabama by November 10, 1956.

4. Therefore your Petitioner attaches hereto and makes a part hereof the office copies of certain documents and/or exhibits which are to the best of your Petitioner's knowledge, information and belief to be true and correct copies of those records, exhibits and pleading and other miscellaneous papers which are presently in, or have been removed from the files of the Circuit Court of Escambia County, Alabama:

(1) Statement by C. F. Rankin, Register.

(2) Copy of Exhibit 2 from United States Court.

(3) Letter from H. M. Caffey dated June 26, ~~1906.~~ 1926

(4) Statement of Hamilton Page and Caffey for service to Rose E. Givens.

(5) Certificate by Reo Kirkland, Clerk of the Circuit Court of Escambia County dated December 30, 1946 showing partnerships of Attorneys involved in the cases from which exhibits have been used in the present case.

(6) Certificate by Reo Kirkland, Register of the Escambia County Circuit Court that the file of Rose E. Givens Admin. vs J. W. Elliott et al is missing from his office.

(7) Certificate dated June 7, 1946 by said Reo Kirkland concerning Jeffrey vs Wiggins Estate, Moulton vs Rose M. Givens Jeffrey and others.

(8) Certificate by said Reo Kirkland dated December 30, 1946 as to certain attorneys of record.

(9) Certificate by said Reo Kirkland dated January 22, 1948 showing certain attorneys of record.

(10) Certificate by said Reo Kirkland dated January 22, 1948 concerning a minute entry.

(11) Certificate by said Reo Kirkland concerning trial documents.

(12) Certificate by said Reo Kirkland as to missing file in Moulton vs Cannon et al and Akison Lumber Company vs Sam Parker.

(13) Copy of page 16 from transcript to State of Alabama Supreme Court in Marie Givens Jeffrey et al vs Wiggins Estate.

(14) Affidavit by J. F. Cook filed in the present cause and previously missing from the Circuit Clerks office.

(15) Affidavit by J. C. Temple, exhibit in present cause previously missing but now returned.

(16) Original copy from J. F. Vickery present Register in Chancery Escambia County Circuit Court.

(17) Copy of pleading in Moulton vs Blacksher Company showing attorneys of record.

(18) Copy of letter by Gerald Stanley Givens to Mr. Jennings Ratcliff dated February 17, 1951.

(19) Copy of letter by Gerald S. Givens dated January 31, 1951 to Mr. J. D. Ratcliff.

(20) Copy of letter from Gerald Stanley Givens dated March 26, 1949 to Mr. C. L. Hybart.

(21) Letter from C. L. Hybart to Mrs. Rose Marie Givens dated September 19, 1941.

(22) Letter from C. L. Hybart dated October 21, 1943 to Mrs. Rose E. Givens.

(23) Letter from C. L. Hybart dated November 18, 1944 to Mr. Gerald S. Givens.

(24) Original copy of letter from C. L. Hybart dated July 19, 1941 to Mrs. Rose Marie Jeffray.

(25) Five documents from the case McCall vs Givens et al and agreement to Decree Pro Confesso by John H. Givens and wife.

(26) Canceled check dated July 12, 1926 by Rose E. Givens.

(27) Letter from Hugh Caffey to Mrs. Rose E. Givens dated July 13, 1926. These two documents proved payment of a certain tax certificate taken in the name of Wiggins Estate Corporation by Hugh M. Caffey Jr., and deficiency judgment included this tax certificate.

(28) Affidavit of non-residence by Hugh R. Williams as attorney for C. A. Moulton.

(29) Letter from Hugh M. Caffey Jr., to Mrs. Rose E. Givens dated May 22, 1931.

(30) Letter from Hugh M. Caffey to Mrs. Rose E. Givens dated February 22, 1936.

(31) Certificate by Sarah H. Griffin, Clerk of the United States District Court, of commitment by Claude Hardy, Judge of Probate.

I further certify that I have personal knowledge of the individual who signed the letters Hugh M. Caffey and Hugh M. Caffey Jr., and they were one and the same person.

5. Petitioner further acknowledges hereto and makes a part hereof a copy of a bill of review and exhibits attached thereto in said case which Petitioner submits herewith in lieu of said record until the said Register in Chancery of Escambia County, Alabama, can prepare a proper transcript of the said record and furnish a properly certified copy thereof to the Supreme Court of Alabama for certification to the Supreme Court of the United States.

6. Your Petitioner respectfully points out that according to the records in the Wiggins case that while your Petitioner was residing in Michigan in 1930 he was served by registered mail as a party respondent in the case of Wiggins Estate Company vs Rose E. Givens et al; but that payments being made on the said mortgage subject of the Wiggins Estate Company foreclosure following the noted service by registered mail to me in Michigan; The Complainant in said cause re-served all of the parties respondent except your Petitioner, Charles A. Givens during the year 1934 and your Petitioner was residing at that time in Florida with a mailing address of Laurel Hill which fact was known to the Attorneys for the said Wiggins Estate Company.

7. An additional document which was missing from the Court records but have been returned since the decision of the Alabama Supreme Court in the present cause being, Amendment to original bill of complaint filed by Gerald S. Givens August 29, 1951 with exhibits attached thereto.

8. That from the period 1930 to the present date your Petitioner has not been a legal resident of the State of Alabama but has at all times been a non-resident; his places of residence or domicile being as follows: During 1930 I resided at 5806 French Road, Detroit, Michigan, that I came from that address into Alabama and on down

to Laurel Hill, Florida; living in lumber camps near there until about 1940 and becoming a registered voter in Okaloosa County, Florida in 1938 copy of my registration certificate and of an affidavit of the County Judge of Okaloosa County and an original certificate of the County Judge as to my sixteen years residence in Florida up to January 26, 1948, attached hereto and made a part hereof. The said certificate setting forth my registration on March 29, 1938 and the said affidavit setting forth as of April 4, 1945 that I was then a qualified elector in good standing.

9. On July 6, 1942 I was employed by United Fruit Company. In March 1943 I was employed by the War Shipping Administration as an acting engineer on the United States Lines Steamship Makawao for services into combat areas. I did not return to Alabama or Florida except for three days until 1945. I was not a party to the bill of review filed by other Givens heirs nor was I made a party by the cross-bill filed by the Wiggins Estate Company all of which was decided in December 1944. I was not a party to the Wiggins Estate Company case arising in 1930 except under the registered mail service and was not represented in that case. During my marine service I was based in the North Atlanta Ports. The only possible designation of my staying in Alabama would be when I came to visit my mother at Andalusia and registered while there under the Selective Service Act. There being only one day left in which I could register and my presence there was because I had a broken arm, was unable to look after myself in my legal residence. And Further, on November 5, 1956, being informed by my counsel, Honorable Charles Bragman of Washington, D. C., that there are two documents in the Bill of Review filed in the case of *Wiggins Estate Company* v. *Jeffrey, et al;* 19 So. 2d 769, which respectively show Hugh R. Williams as "Solicitor for Respondents" and at Attorney of Record for Charles Alexander Givens,

I stated to Mr. Bragman that this is the first time I heard that name. I never authorized or employed Hugh R. Williams to represent me in any capacity. Upon further questioning by Mr. Bragman, I stated that I never acquiesced in or ratified any action taken by said Mr. Williams. I had no attorney in that case.

10. One further exhibit referred to in the sworn statement filed with the Supreme Court of Alabama being part of the proof filed with Judge Worth Thagard in the case of Givens vs Caffey in proving a charge of prejury being a certificate from United States District Court of Florida certified October 12, 1953.

/s/ Charles A. Givens
Charles A. Givens

STATE OF ALABAMA
BALDWIN COUNTY

Before me the undersigned authority personally appeared Charles A. Givens who being duly sworn deposes and says: That according to his information, knowledge, belief and recollection, the facts stated in the foregoing petition is true and correct.

/s/ Charles A. Givens

Sworn to and subscribed this the 6th day of November, 1956.

/s/ Randolph McGowan, Jr.
Notary Public, State of
Alabama at Large.

My Commission expires
9/13/60

H. ISLE ENZOR
Sheriff
LERON W. RICE
Clerk of Court
C. L. CAMPBELL
Tax Collector
J. H. VAUGHAN
Tax Assessor
JOHN F. CAMPBELL
Superintendent of Schools

COMMISSIONERS

JOHN W. KENNEDY
Chairman
LUNNIE BARNES
H. L. HILTON
WALTER S. SPENCE
LANCE C. FOUNTAIN

WILBUR F. OSBURN
Judge for Okaloosa County
CRESTVIEW, FLORIDA

January 26, 1948

TO WHOM IT MAY CONCERN:

This will certify that the undersigned is acquainted with Lieut. Charles A. Givens. That to the best of my knowledge, Lieut. Charles A. Givens has resided in Okaloosa County, State of Florida for the past sixteen years. That during the last primary election held in the State of Florida in the year 1944, Lieut. Charles A. Givens was a qualified elector in the above mentioned State and County. That his home is Laurel Hill, Okaloosa County, Florida.

/s/ Wilbur F. Osburn
Wilbur F. Osburn
Okaloosa County Judge

WFO/vo

H. ISLE ENZOR
Sheriff
LERON W. RICE
Clerk of Court
C. L. CAMPBELL
Tax Collector
J. H. VAUGHAN
Tax Assessor
JOHN F. CAMPBELL
Superintendent of Schools

COMMISSIONERS

JOHN W. KENNEDY
Chairman
LUNNIE BARNES
H. L. HILTON
WALTER S. SPENCE
LANCE C. FOUNTAIN

WILBUR F. OSBURN
Judge for Okaloosa County
CRESTVIEW, FLORIDA

April 4, 1945

STATE OF FLORIDA
OKALOOSA COUNTY

TO WHOM IT MAY CONCERN:

This will certify that the undersigned is well acquainted with Charles A. Givens, a resident of Laurel Hill, Okaloosa County, Florida.

This will further certify that the said Charles A. Givens is a duly qualified elector of said State and County and was qualified as such during the past primaries in General Election held in said State and County. That the said Charles A. Givens cast his absentee ballot and such ballot was counted by the Canvassing Board and the undersigned, who is a member of said board.

/s/ Wilbur F. Osburn
Wilbur F. Osburn
Okaloosa County Judge

Sworn to and subscribed before me this 4th day of April, 1945.

C. L. CAMPBELL
Notary Public

(Form P. 1)

REGISTRATION CERTIFICATE NO.....

Office of Secretary of State
R. A. GRAY, SECRETARY OF STATE
STATE OF FLORIDA:
County of Okaloosa
Election District No. 5

Date Registered 3—29, 1938

The bearer, Charles A. Givens, is at the date hereof a registered elector in the above district, residing at Laurel Hill, Florida, is 36 years of age, political party affiliation D, occupation Loggins, color W, sex M, nativity U. S. If born in any foreign country, state here the place, court and date of naturalization.....

Freeholder?.....

This registration is made in accordance with the laws of the State of Florida.

G. F. KIRKLAND
Supervisor of Registration

By.....
Deputy

EXCERPTS FROM BILL OF REVIEW FILED BY MINOR HEIRS OF JONES OF JAMES A. GIVENS IN CASE OF WIGGINS ESTATE CO. v. JEFFERY ET AL. (1944), 19 SO. 2d 769, 246 ALA. 183

At a regular, adjourned, or special term of the Circuit Court of Escambia County, Alabama, in Equity, at which the officers authorized by law to hold or serve such court were serving, the following proceedings were had in the cause styled ROSE MARIE GIVENS JEFFERY, LILLIAN MOZELLE GIVENS GREER, ROBERT HENLEY GIVENS, SUSIE KATE GIVENS AND GERALD STANLEY GIVENS, COMPLAINANTS, vs. WIGGINS ESTATE COMPANY, INC., A CORPORATION AND C. A. MOULTON, RESPONDENT:

BILL OF COMPLAINT

ROSE MARIE GIVENS JEFFERY, LILLIAN MOZELLE GIVENS GREER, ROBERT HENLEY GIVENS, SUSIE KATE GIVENS AND GERALD STANLEY GIVENS,

COMPLAINANTS

vs.

WIGGINS ESTATE COMPANY, INC., A CORPORATION, AND C. A. MOULTON,

RESPONDENTS

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA IN EQUITY AT BREWTON, ALABAMA

To Honorable F. W. Hare, Judge of said Court:

Complainant, Rise Marie Givens Jeffery (formerly Rose Marie Givens), Lillian Mozelle Givens Greer (formerly Lillian Mozelle Givens), Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, bring and exhibit this bill of review, or original bill in the nature of a bill of review, against Wiggins Estate Company, Inc., a corporation, and C. A. Moulton, and in support thereof respectfully show and represent unto the court the following facts, to-wit:

FIRST

That each of the complainants is over twenty-one years of age, and a resident of Covington County, Alabama. That complainant, Rose Marie Givens Jeffery, was born on, to-wit, June 17th, 1908. That complainant, Lillian Mozelle Givens Greer, was born on, to-wit, September 17th, 1909. That complainant, Robert Henley Givens, was born on, to-wit, May 24th, 1912. That complainant, Susie Kate Givens, was born on, to-wit, July 27th, 1914. That complainant Gerald Stanley Givens, was born on, to-wit, November 28th, 1917. That respondent, Wiggins Estate

Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Alabama, with its principal place of business located at Brewton, Escambia County, Alabama. That respondent, C. A. Moulton, is over twenty-one years * * *

EXHIBIT NO. 1

STATE OF ALABAMA
ESCAMBIA COUNTY

To the Honorable, the Circuit Court of Escambia County, Alabama, and to the Honorable Francis W. Hare, Judge thereof,

Comes The Wiggins Estate Company, Inc., a corporation organized under the laws of the State of Alabama, and submits and exhibits this its Bill of Complaint against Rosa E. Givens, as Administratrix of the estate of James Alexander Givens, deceased; Rose E. Givens, as guardian of the estates of Rose Marie Givens, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, who were minors on June 26th; Rose E. Givens, individually, who is over the age of twenty-one years, and who resides at Andalusia, in Covington County, Alabama; Bertha G. Moll, who is over the age of twenty-one years, and who resides at Troy, in Pike County Alabama; Herman E. Moll, who is over the age of twenty-one years and who resides at Troy, in Pike County, Alabama; Angelyne C. Taylor, who is over the age of twenty-one years, and who resides at Andalusia, in Covington County, Alabama; R. P. Taylor, who is over the age of twenty-one years and resides at Andalusia, in Covington County, Alabama; Louise Givens Jones, who is over the age of twenty-one years and resides at Andalusia, Alabama; Glenn Jones, who is over the age of twenty-one years and resides at Andalusia, Covington County, Alabama; Rose Maria Givens Jeffery, who is over twenty-one years of age and resides at

Greenville, in Butler County, Alabama; Lillian Mozelle Givens, who is over the age of eighteen years and under the age of twenty-one years, and resides at Andalusia, in Covington County, Alabama; Robert Henley Givens, who is under the age of eighteen years and over the age of fourteen years, and resides with his mother, Mrs. Rose E. Givens, at Andalusia, in Covington County, Alabama; Susie Kate Givens, who is about fourteen years of age, and resides with her mother, Mrs. Rose E. Givens, at Andalusia, in Covington County, Alabama; Gerald Stanley Givens, who is about eight years of age, and who resides with his mother, Mrs. Rose E. Givens, at Andalusia, in Covington County, Alabama; and Charles Alexander Givens, over twenty-one years of age, a non-resident of the State of Alabama, and who resides at #5806 French Road, Detroit, Michigan.

Humbly complaining, your Complainant would represent unto Your Honor and unto this Honorable Court as follows:

First:

That on, to-wit, the 26th day of June, 1926, Rose E. Givens, as administratrix of the estate of James Alexander Givens, deceased, and as Guardian of her then minor children, Rose Marie Givens, who has since married Arthur B. Jeffery; Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens, and Gerald Stanley Givens, the said minors being also the minor heirs of James Alexander Givens, deceased; Bertha C. Moll, who is the daughter and heir of the said James Alexander Givens, together with her husband, Herman H. Moll; Angelyne C. Taylor, who is also a daughter of the said James Alexander Givens, deceased, and her husband, R. F. Taylor; and Charles A. Givens, who is a son of the said James Alexander Givens, obtained from the complainant a loan of one thousand, five hundred dollars (the mortgage and note secured by said mortgage show that the loan was made for two thousand dollars, but only fifteen hundred dollars was advanced on

said note and mortgage) for the purpose of paying taxes and or redeeming the lands and property belonging to the estate of James Alexander Givens and or for the purpose of redeeming from tax sales lands belonging to the estate of the said James Alexander Givens, deceased, and or for the purpose of paying expenses and charges against the real estate belonging to the estate of the said James Alexander Givens, deceased, which indebtedness was evidenced by the promissory note of the said last named parties, copy of which said note is hereto attached, marked "Exhibit A," and made a part of this complaint, and the said parties last named gave a mortgage to complainant to secure the payment of the said note and attorney's fees and all other charges and expenses agreed to be paid in said note and any and all renewals of the same, the said note being payable one year from the date thereof, on, to-wit, the 26th day of June, 1927, liable for same and that if any deficiency decree should be rendered by this Honorable Court that it should be only against those who signed the note marked Exhibit "A" and not against those like your respondent who merely joined in the execution of said mortgage so that his wife's undivided interest might be properly conveyed by said mortgage.

Your respondent further alleges that the attorney for the complainant, Hon. Ed. Leigh McMillan, has told your respondent and his Solicitor of record that he would not insist on any deficiency decree against your respondent and that he admits there can be no liability whatever on your respondent for any amount the court may ascertain to be due the complainant by such deficiency decree.

Now having answered this bill of complaint as fully as your respondent is advised he asks to go hence with his cost in his behalf expended.

Marcus J. Fletcher
Solicitor for Respondent.

Filed April 10, 1930
C. W. Weaver, Register

EXHIBIT NO. 3

The Wiggins Estate Co., Inc.,
Complainant

vs.

Mrs. Rose E. Givens, as Administratrix, and others,
Respondents

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

This cause coming on to be heard upon the bill of complaint filed in said cause, and it appearing to the court that summons was duly issued to the respondents, Rose E. Givens, as Administratrix of the estate of James Alexander Givens, deceased; Rose E. Givens, as guardian of the estates of Rose Marie Givens, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens; Rose E. Givens, Bertha G. Moll, Herman H. Moll, Angelyne G. Taylor, R. P. Taylor, Louise Givens Jones, Glenn Jones, Rose Marie Givens Jeffery, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens, Gerald Stanley Givens and Charles Alexander Givens, requiring them to appear and plead to, answer or demur to the bill of complaint within thirty days after service of said summons; and it appearing to the court from the returns of the sheriff on said summons that services of said summons was had on the respondents on the following dates, to-wit: One Rose E. Givens, as Administratrix of the estate of James Alexander Givens, and Rose E. Givens, as Guardian of the estates of Rose Marie Givens, Lillian Mozelle Givens, Susie Kate Givens and Gerald Stanley Givens; and Rose E. Givens, Angelyn G. Taylor, R. F. Taylor, Louise Givens Jones, Glenn Jones, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens, and Gerald Stanley Givens on the 5th day of March, 1930; on

Herman H. Moll and Bertha G. Moll on the 5th day of March, 1930; on Rose Maria Givens, Jeffery on the 1st day of March, 1930. And it further appearing from the certificates of the Register of said court that service was had on Charles Alexander Givens, one of the respondents, in strict compliance with Section 9431 of the present Code of Alabama, by mail to him on the 25th day of February, 1930, a copy of the summons, together with a copy of the bill of complaint filed herein, sending the same by registered mail postage prepaid, marked "For delivery only to the person to whom addressed." said letter addressed to him at his last known address, to-wit, #5806 French Road, Detroit, Michigan, and demand made by said Register for return receipt to him; and that return receipt was received by said Register showing delivery of the letter containing cope of said summons and copy of the bill of complaint to the said Charles Alexander Givens, on March 30th., 1930; and it further appearing to the court that thirty days have expired since the service of said summons upon the said respondents and each of them, and none of said respondents, except R. P. Taylor, have up to this time appeared and plead to, answer or demur to the bill of complaint.

Now, therefore, it is ordered, adjudged and decreed that the said bill of complaint be, and the same is hereby taken as confessed against the said respondents, and each of them, except R. P. Taylor; that is to say, all of the allegations of the said bill of complaint are taken as confessed against said respondents (except the said R. P. Taylor.)

Done, on this the 19th day of November, 1930.

(Signed) F. W. Hare, Judge.

Filed This 19th day of
November, 1930.
C. W. Weaver, Register.

EXHIBIT NO. 4

The Wiggins Co., Inc.,
Complainant.

vs.

Mrs. Rose E. Givens, as Administratrix, and others,
Respondents

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

This cause coming on to be heard upon the bill of complaint, and the decree pro confesso issued against all of the respondents except R. P. Taylor, and on the answer of the said respondent, R. P. Taylor, filed herein.

And it appearing that this is a bill for foreclosure of a mortgage and the ascertainment of the amount due thereunder, and for the sale of the property described in and conveyed by said mortgage; and it further appearing that the infants or minors who are interested, or whose estates are interested in this cause as parties respondents, are represented by their general guardian; It is, therefore, ordered that this cause be, and hereby is, referred to the Register of this court, who shall hold a reference, of the time, place and date of which he shall give notice to all parties, or to their solocitor or solicitors of record, as provided by law; at which said reference he shall ascertain the amount due by said mortgage, and what would be a reasonable attorney's or solicitor's fee to be allowed the attorney representing the complainant in this cause; and said Register shall hear testimony and ascertain and report to the court his findings and or conclusions in the premises.

Ordered, adjudged and decreed, on this the 21st day of July, 1931.

(Signed) F. W. Hare, Judge

Filed This 21st day
of July, 1931.

G. W. Weaver, Register.

EXHIBIT NO. 5

Wiggins Estate Company, Inc., a corporation,
Complainant

vs.

Rose E. Givens, et als.,
Respondents

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

TO HON. F. W. HARE, JUDGE OF SAID COURT, IN EQUITY SITTING;

How comes Robert H. Givens and Mrs. Marie Givens Jeffery and for answer to the bill of complaint filed in this cause represent unto this Honorable Court as follows:

1. The averments of the first paragraph of the bill of complaint are denied in so far as the same pertains to and state the purpose for which the loan therein referred to was made.

2. The allegations of the second, third, fourth, fifth and sixth paragraphs of the bill of complaint are admitted.

3. The allegations of the seventh paragraph are denied.

4. The said respondents, Robert H. Givens and Mrs. Marie Givens Jeffery, further represent and show unto this Honorable Court that on the date when the mortgage

referred to in the bill of complaint was executed, that is, the 26th day of June, 1926, the said respondents and each of them were under the age of twenty-one years; that Mrs. Rose E. Givens was the guardian of the said respondents; that the real estate described in the bill of complaint and in the mortgage referred to therein had belonged to James Alexander Givens, father of your respondents, at the time of his death; that your respondents each inherited a one-tenth undivided interest in said real estate, and that your respondents and each of them now own a one-tenth undivided interest in said real estate.

5. Your respondents further represent unto this Honorable Court that the said Mrs. Rose E. Givens, guardian of the said minors, signed and executed the said mortgage without authority; and she had applied for and obtained no order from any court having jurisdiction in the premises authorizing her to execute the said mortgage or to in any way encumber the undivided interest of your said respondents in the land purported to have been encumbered by said mortgage; that the moneys obtained from the complainant at the time of the execution of said mortgage were not used for paying taxes, redeeming the lands and property belonging to the estate of James Alexander Givens; redeeming lands from tax sales or paying expenses and charges against the real estate belonging to the estate of the said James Alexander Givens, deceased, but that the said moneys were used by the guardian of said minors for other purposes.

6. Your respondents further represent unto this Honorable Court that the said mortgage executed by the said Mrs. Rose E. Givens, as guardian as aforesaid, on its face appears to be a good and valid mortgage and apparently is sufficient to constitute a good and valid encumbrance and valid encumbrance and lien upon the real estate described therein; that although the said mortgage on its face appears to be good and valid, the same is, in

realty, invalid as to the undivided interest in said lands owned by the said Robert H. Givens and Marie Givens Jeffery, the respondents filing this answer.

7. Your respondents further represent unto this Honorable Court that the said mortgage constitutes a cloud on the title to said lands owned by your respondents.

PRAYER FOR RELIEF.

Your respondents pray that this answer be taken as a cross-bill and that the original complainant, that is, Wiggins Estate Company, Inc., a Corporation, be made a cross-respondent to the said cross bill, and that it be required to answer the allegations of said cross bill as required by law; that upon final hearing hereof, your Honor will order, adjudged and decree that the mortgage sought to be foreclosed by the original complainant and cross respondent is invalid as the same purport to encumber the undivided interest in the lands described therein owned by your respondents and cross complainants; that the said mortgage is null and void as the same may purport to affect or encumber the undivided interests of your respondents and cross complainants in said land; that the said mortgage constitutes a cloud on the title of your respondents and cross complainants, and that this Honorable Court will order, adjudge and decree that the said mortgage be cancelled and removed as the same pertains to or affects the undivided interests of your respondents in said lands. Your respondents and cross complainants further pray for such further, other and different relief as in equity and good conscience they may be entitled to receive in the premises, and as to their rights under this answer and cross bill, the respondents and cross complainants submit themselves to the jurisdiction of this court and offer to do full and complete equity.

PRAYER FOR PROCESS.

And may it please your Honor and this Honorable Court to grant unto your respondents and cross complainants the writ of summons of the State of Alabama to be directed to the said Wiggins Estate Company, Inc., a Corporation, commanding it to appear before this Honorable Court within thirty days from the service thereof, then and there to answer all and singular, the premises, and to stand and abide such order and decree as to this Honorable Court shall seem meet, and your cross complainants shall ever pray, etc.

Hugh R. Williams,
Solicitor for the cross complainants.

FOOT-NOTE:

The cross respondent, Wiggins Estate Company, Inc., a Corporation, is required to answer each paragraph of the foregoing cross bill, numbered * * *

EXHIBIT NO. 9

Wiggins Estate Co., Inc.
Complainant

vs.

Rose E. Givens, et als.,
Defendants

IN THE CIRCUIT COURT OF
ESCAMBIA COUNTY, ALABAMA

IN EQUITY

The complainant in the above entitled cause having made suggestion to me in vacation that Bertha G. Moll, one of the defendants in the above entitled cause, died intestate while a resident of the State of Alabama, and left surviving her the following heirs and none others,

namely, Hemman H. Moll, Mrs. Rose E. Givens, Charles Alexander Givens, Louise Givens Jones and husband Glen Jones, Marie Givens Jeffrey and husband Arthur B. Jeffrey, Angeline G. Taylor and husband R. P. Taylor, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, the latter two being minors, and that Mrs. Rose E. Givens is the legal guardian of their estate, the ages, residences and conditions of said heirs being fully set out in the complainant's petition, it is therefore ordered by the Register in vacation under rule 101 of Chancery Practice that a summons issue to the said heirs of Bertha G. Moll, deceased, to appear on or before the 13th day of May, 1935, and defend the aforesaid suit of Wiggins Estate Inc, a corporation, Vs. Rose E. Givens, et als, defendants, in the place of the said decedent, Bertha G. Moll;

It is further ordered that summons be served on Mrs. Rose E. Givens individually and as the guardian of the estates of Susie Kate Givens and Gerald Stanley Givens, minors, and upon Herman H. Moll, Charles Alexander Givens, Louise Givens Jones, Glen Jones, Angeline G. Taylor, Lillian Mozelle Givens and Robert Healey Givens, and upon Susie Kate Givens and Gerald Stanley Givens by personal service upon them for thirty days prior to the day set; and that said summons be sent to Marie Givens Jeffrey and Arthur B. Jeffrey who are non-residents of the State of Alabama and reside at 911 Iris Street, Lake Charles, Louisiana, by registered mail, return receipt requested and for delivery to the addressees, for delivery and return for thirty days prior to said date.

This the 25 day of March, 1935.

J. F. Smith,
Register Circuit Court,
Escambia County, Ala.

Filed March 25th, 1935.
J. F. Smith, Register

EXHIBIT NO. 16

WIGGINS ESTATE COMPANY, INC.,
A CORPORATION,
COMPLAINANT

VS.

ROSE E. GIVENS, ET ALS.,
DEFENDANTS

IN THE CIRCUIT COURT
OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

Now comes Stanley Givens and Kate Givens, minors, acting by and through Robert H. Givens as next friend of said minors and hereby make themselves parties to the answer and cross bill filed in this case by Robert H. Givens and Mrs. Marie Givens Jeffery, and represent unto the Court as follows:

1. That they are minors under the age of twenty-one years.

2. That they are children and heirs at law of James Alexander Givens, deceased, and Rose Givens.

3. That they own a one-tenth interest in the property described in the mortgage which the complainant now seeks to foreclose.

And the said Stanley Givens and Kate Givens hereby adopt the answer and cross bill heretofore filed as aforesaid.

Hugh R. Williams
Attorney for Robert H. Givens
as next friend of Stanley
Givens and Kate Givens.

Filed July 3, 1935.
J. F. Smith, Register.

Comes the respondents in the above styled cause, and each and every one of them, and demur to the bill of complaint heretofore filed in this cause, and as grounds for said demurrer set down and assign the following reasons, to-wit:

1. There is no equity in said bill of complaint.

2. The complainant has a complete and adequate remedy at law.

Hugh R. Williams,
Solocitor for Respondents.

Filed: May 11th, 1935.
J. F. Smith, Register

EXHIBIT NO. 12

Wiggins Estate Company, Inc.,
Complainant

VS.

Rose E. Givens, et als.,
Defendants

IN THE CIRCUIT COURT OF
ESCAMBIA COUNTY, ALABAMA

IN EQUITY

• • • ascertain the amount of principal and interest due under the promissory note secured by said mortgage and copy of which is attached as Exhibit "A" to the bill of complaint, and shall also ascertain the principal and interest due on account of any further advances made by complainant to the mortgagors as permitted by the terms of said mortgage, including any amounts the complainant may have expended after the date of said mortgage in discharging tax liens, or other prior liens, for the preservation of its security.

(2) The Register shall ascertain what amount would be a reasonable attorney's fee or solicitor's fee to be allowed the attorneys representing the complainant in this cause.

(3) The said Register shall hear testimony either orally or by written interrogatory, as he may designate, and shall reduce to writing the testimony so offered, and return same to this court, together with his findings or conclusions in the premises on or before July 15th., 1935, and this cause is reserved by the court for further orders.

(4) Before entering upon said reference the Register shall give notice as required by law, by citation to be personally served on all defendants or upon H. R. Williams, their attorney of record.

Ordered, adjudged and decreed this 19th day of June, 1935.

F. W. Hare
Judge 21st Judicial Circuit.

Filed June 19th., 1935.
J. F. Smith, Register

EXHIBIT NO. 13.

Wiggins Estate Co., Inc.,
Complainant

VS.

Rose E. Givens, et als.,
Defendants

IN THE CIRCUIT COURT ESCAMBIA COUNTY, ALABAMA

IN EQUITY

TO ROSE E. Givens, Individually, and as guardian of the estates of Susie Kate Givens and Gerald Stanley Givens, minors.

To Herman H. Moll, Charles Alexander Givens, Louise Givens Jones, Glen Jones, Ageline C. Taylor, R. P. Taylor, Lillian Mozelle Givens, Robert Henley Givens, Marie Givens Jeffrey and Arthur B. Jeffrey, or To Hugh B. Williams, their attorney-of-Record.

This is to give notice that pursuant to an order and decree of the Honorable F. W. Hare, Judge of the Circuit Court of the 21st Judicial Circuit of Alabama, sitting in equity, the undersigned will proceed to hold a reference in his office at the Courthouse at Brewton, Alabama, at 10 o'clock A. M. on the 3rd day of July, for the purpose of ascertaining and reporting on the following matters and facts:

(1) To ascertain what amount of principal and interest is due under and by virtue of that certain mortgage set out and described in the bill of complaint in this cause, copy of which is attached as Exhibit "B" thereto. It being required that the Register shall ascertain the amount of principal and interest due under the promissory note secured by said mortgage and copy of which is

attached as Exhibit "A" to the bill of complaint, and shall also ascertain the principal and interest due on account of any further advances made by complainant to the mortgagors as permitted by the terms of said mortgage, including any amounts the complainant may have expended after the date of said mortgage in discharging tax liens, or other prior liens, for the preservation of its security.

(2) To ascertain what amount would be a reasonable attorney's fee or Solicitor's fee to be allowed the attorneys representing the complainants in this cause.

At the hearing of said matters either party to this cause may offer oral testimony and such written documents as may be pertinent to the facts at issue.

Witness my hand this 20th day of June, 1935.

J. F. Smith,

Register, Circuit Court, Escambia County, Alabama.
Filed June 19th., 1935.

J. F. Smith, Register

STATE OF ALABAMA)
ESCAMBIA COUNTY)

I have served a copy of the foregoing notice on Hugh R. Williams as attorney of record for Rose E. Givens, individually and as guardian of the estates of Susie Kate Givens and Gerald Stanley Givens, minors, and attorney of record for Herman H. Moll, Charles Alexander Givens, Lillian Mozelle Givens, Robert Henley Givens, Marie Givens Jeffrey and Arthur B. Jeffrey, on this the 20th day of June, 1935.

J. R. Roby,
Sheriff, Escambia County, Alabama

EXHIBIT NO. 18

WIGGINS ESTATE COMPANY, INC.,
A CORPORATION,
COMPLAINANT

vs.

ROSE E. GIVENS, ET ALS,
RESPONDENT

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

July 15, 1935.

In this cause it being made to appear to the Court that heretofore on June 1st, 1935, the Court entered an order overruling the demurrers of all respondents to the bill of complaint and allowing them a period of twenty days from said date to file answer to the amended bill of complaint if they so desired, and it appearing that the following defendants, namely, Herman H. Moll, Mrs. Rose E. Givens, Charles Alexander Givens, Angeline Givens Taylor, R. P. Taylor, Louise Givens, Jones, Glen Jones, Arthur B. Jeffry and Lillian Mozelle Givens, have filed no answer to this day:

It is therefore, upon motion of the complainant in open court, hereby ordered, adjudged and decreed by the Court that the bill of complaint as amended, be and the same hereby is, in all things taken as confessed as against the aforesaid defendants, namely, Herman H. Moll, Mrs. Rose E. Givens, Charles Alexander Givens, Angeline Givens Taylor, R. P. Taylor, Louise Givens

Jones, Glen Jones, Arthur B. Jeffrey and Lillian Mozelle Givens,

F. W. Hare
Judge of Circuit Court of
Escambia County, Alabama.

July 15, 1935.

EXHIBIT NO. 19

THE WIGGINS ESTATE COMPANY, INC.,
A CORPORATION,
PLAINTIFF

vs.

ROSE E. GIVENS, ET ALS,
DEFENDANTS

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

In the foregoing cause the complainant submits on reference before the Register on the following testimony:

(1) The original bill of complaint and exhibits thereto.
(2) Testimony of Lily M. Tippins.
(3) Testimony of Leon G. Brooks
This the 3rd day of July, 1935.

McMILLAN & CAFFEY.
Solicitors for Complainant.

I certify that this is a correct note of testimony on submission upon reference.

J. F. Smith
Register.

Filed July 15, 1935.
J. F. Smith, Register

EXHIBIT NO. 23

WIGGINS ESTATE COMPANY, INC.
COMPLAINANT

vs.

ROSE E. GIVENS, ET ALS,
RESPONDENTS

THE STATE OF ALABAMA, ESCAMBIA COUNTY,
CIRCUIT COURT, IN EQUITY

No. 1434

In this cause comes the complainant by its Solicitors and submits the same for final decree upon the original Bill and exhibits thereto, Decree pro confesso, amendment to bill of complaint, answers to cross bill and upon the following testimony, to wit:

Testimony of Lily M. Tippin.

Report of reference and decree confirming same.

Testimony of Ed Leigh McMillan.

The respondents submit on answers to bill of complaint as amended and cross bill.

I hereby certify that the above note of testimony is correct.

This 21 day of Jan. 1936.

J. F. Smith, Register

Filed Jan. 21, 1936
J. F. Smith, Register

EXHIBIT NO. 24

WIGGINS ESTATE COMPANY, INC.,
A CORPORATION,
COMPLAINANT

vs.

ROSE E. GIVENS, ET ALS,
RESPONDENTS

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, ALABAMA

IN EQUITY

January 21, 1936.

In this cause the Court is satisfied from the evidence offered that the money loaned to respondents by the complainant in said cause, and secured by mortgage upon certain real estate as therein described, copy of which mortgage is attached as Exhibit "B" to the bill of complaint, was advanced for the purpose of protecting and preserving the assets of the estate of James Alexander Givens, deceased, and for the protection and preservation of the estates of the adult and minor heirs of said James Alexander Givens, deceased, from sales under liens accruing against the real estate so mortgaged. Likewise, the Court is satisfied that if Rose E. Givens, as Administratrix of the estate of James Alexander Givens, deceased, and as guardian of the estate of the minor heirs of said James Alexander Givens, had applied to this Court in the first instance for authority to join the adult heirs in obtaining this loan for the purpose of paying off debts then due, this Court would have entered a decree authorizing same. The Court, is therefore, of the opinion that said loan should now in all things be ratified and confirmed, in all respects as if authorized

at the outset, and that the interests of the wards who were minors at the time said loan was obtained by their guardian should be sold along with the interests of the adult heirs, and this whether or not said wards are now of age. The Respondent, Rose E. Givens as administratrix and as guardian, having agreed at the time of obtaining this loan and executing said mortgage that she would, if necessary, have same approved and ratified by appropriate proceedings to that end, this Court will treat as done what in equity and good conscience she should have done.

The Register, will therefore, enroll the following decree:

DECREE

This cause coming on this day to be heard, was submitted for final decree upon the pleadings and proofs as noted by the Register, and the same having been argued to and considered by the Court, the Court is of the opinion that the Complainant is entitled to the relief prayed for in its bill of complaint and amended bill of complaint, and that the respondents Robert H. Givens, Marie Givens Jeffrey, Gerald Stanley Givens and Susie Kate Givens are not entitled to any relief under their cross bills filed herein.

It is, therefore, ordered, adjudged and decreed that the Court, and it is the judgment of the Court, that the complainent Wiggins Estate Company, Inc., a corporation, has lien upon the land set forth and described in the mortgage, copy of which is attached as Exhibit "B" to the bill of complaint; that the indebtedness secured by said mortgage is past due and that the principal, interest and attorneys' fees due on said note and mortgage amounts to Two Thousand Seven Hundred Thirty-seven and 58/100 ($2,737.58) Dollars, all as shown by the report of the Register, which has heretofore been filed in

this Court, and has been in all things ratified and confirmed.

It is, therefore, ordered, adjudged and decreed that the respondents in this cause shall pay into this Court for the complainant the sum of Two Thousand Seven Hundred Thirty-seven and 58/100 ($2,737.58) Dollars, together with interest thereon at the rate of 6% per annum from this date, and together with all costs of this Court, within thirty days after the date of this decree, and in default thereof, that the Register of this Court shall proceed to advertise and sell the lands described in the mortgage, copy of which is attached to the original bill of complaint, and all of the interest therein owned by the heirs of James Alexander Givens, deceased, and all of the interest therein owned by the heirs of Mrs. Bertha G. Moll, deceased, at public outcry before the courthouse door in the City of Brewton in Escambia County, Alabama, either in separate parcels or as a whole, as the Register may elect, to the highest and best bidder for cash, after first having given thirty days notice to the time, place and terms of sale by advertisement in the Brewton Standard, a newspaper published in said County. Said lands are situated in Escambia County, Alabama, and are more particularly described as follows, to-wit:

Parts of Sections	Section	Tp.	Range.	No. of Acres
SW¼ of NW¼ and NE¼ of SW¼	2	1 N	13 E	80
SW¼	3	1 N	13 E	160
E½ of NW¼	5	1 N	13 E	80
SE¼	25	1 N	13 E	160
NE¼ and E½ of SE¼	27	1 N	13 E	240
NW½ of SE¼ and S½ of SE¼	33	1 N	13 E	120
NE¼ of SE¼ and SE¼ of NW¼ and W½ of NE¼ and N½ of NW¼ and SE½ of NW¼ and SW½ of SW¼	34	1 N	13 E	320
SW½ of NE¼ and E½ of SW¼ and NW½ of SE½	36	1 N	13 E	160
SW¼ of SE¼	8	2 N	13 E	40
S½ of SW½S	20	2 N	13 E	80
S½ of NE¼ and N½ of NW¼	29	2 N	13 E	160
The East 12 acres of Lot. No. 1	20	6 N	25 W	12
The West 11 acres of Lot. No. 2	21	6 N	25 W	11
30 acres in the NW corner of Lot No. 2	28	6 N	25 W	30
31 acres in the NE corner of Lot No. 1	29	6 N	25 W	31
	Total			1684

A more exact description of the fractions in Township 6 R. of Range 25 W. if found in that certain deed and the map attached there to be made by Bagdad Land & Lumber Company to John H. Givens et al, dated June 16th, 1915, and recorded in Deed Book 43, page 103, Probate Records of Escambia County, Alabama.

It is further ordered that out of the proceeds of sale the Register retain the costs and expenses of this suit and of said sale, and apply the remainder thereof to the payment, either in whole or pro tanto, of the mortgage indebtedness due as aforesaid, and if the amount bid for the said land be more than sufficient to satisfy the amount of the indebtedness due from the respondents to the complainant under said mortgage after satisfying the costs of this proceedings, then any surplus shall be paid over to said respondents. If the amount bid for said lands proves insufficient for the payment of costs and for the payment of the principal and interest as

above set out, then the Register of this Court shall forthwith upon confirmation of said sale, enter a judgment and decree against the following respondents, namely: Mrs. Rose E. Givens, individually, Rose E. Givens as administratrix of the estate of James Alexander Givens, deceased, Rose E. Givens as guardian of the estates of Rose Marie Givens, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, and against Angelyne G. Taylor, Rose Marie Givens Jeffrey, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens, Gerald Stanley Givens and Charles Alexander Givens, for such sum as shall remain due after deducting the amount paid by the purchaser of said land from the amount of the costs and mortgage indebtedness then due. It is ordered that the Register make report to this Court of said sale for confirmation or rejection, and if same be confirmed then he make conveyance of said lands to the purchaser or purchasers, and if necessary issue process to place the purchaser or purchasers in possession. This 21st day of January, 1936.

F. W. Hare
Judge Circuit Court of
Escambia County, Alabama.

January 21, 1936.

EXCERPT—EXHIBIT 27

• • • the complainant, The Wiggins Estate Company, Inc., a Corporation, do have and recover of the respondents, Mrs. Rose E. Givens, individually, Mrs. Rose E. Givens as administratrix of the estate of James Alexander Givens, deceased, Mrs. Rose E. Givens as guardian of the estates of Rose Marie Givens, Lillian Mozelle Givens, Robert Henley Givens, Susie Kate Givens and Gerald Stanley Givens, and do have and recover of

Angelyn G. Taylor, Rose Marie Givens Jeffrey, Lillian Mozelle Givens, Robert Henley Givens and Susie Kate Givens, Gerald Stanley Givens and Charles Alexander Givens, the sum of Nine Hundred twenty-eight and 70/100 ($928.70) Dollars, for the recovery of which let execution issue.

This the 21st day of April, 1936.

F. W. Hare,
Judge Circuit Court,
Escambia County, Alabama.

Made and entered; April 21st, 1936.

J. F. Smith, Register.

Recorded Equity Minute Book, Vol. 4, page 130.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any

of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions * * *

* * * *

* * * *

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

* * * *

ALABAMA

Tit. 7, § 727 Tit. 7, § 727

CIVIL REMEDIES AND PROCEDURE.

CHAPTER 15.

REDEMPTION OF REAL ESTATE.

Sec.

727. Redemption by debtor et als.
728. Priority of rights to redeem and notice required.
729. Redemption from junior mortgagee or judgment creditor.
730. Possession must be delivered on demand.
731. Written demand for charges; may file bill.
732. Lawful charges, what are; title vests; right to.
733. Bill to enforce right to title, etc.
734. Rights; payment into court; offer to do equity.
735. Judgment creditors allowed to redeem.
736. When purchaser, etc., may refuse to allow redemption.
737. Redemption by one creditor from another.

738. Certain parties deemed creditors.
739. The debtor, his vendee, etc., may redeem from a redeeming judgment creditor.
740. Value of permanent improvements to be paid; value ascertained by referees.
741. Refusal to appoint a referee; penalty.
742. Redemption by and from representatives of estates.
743. Rights conferred are personal privileges and not property or property rights.

§ 727. (10140) (5746) (3505) (1878) (2877) (2509) (2116) Redemption by debtor et als.—Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in the circuit court, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee, vendee of the debtor, or assignee of the equity or statutory right of redemption, wife, widow, child, heir at law, devisee, or any vendee or asignee of the right of redemption under this Code, from the purchaser, or his vendee, within two years thereafter in the manner provided in this chapter.

• • • •

Office - Supreme Court, U.S.
FILED
FEB 4 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 562

CHARLES A. GIVENS
Petitioner

v.

C. A. MOULTON

PETITION FOR WRITS OF CERTIORARI TO GET DOCUMENTS MISSING FROM RECORD AND PETITION FOR REHEARING

CHARLES BRAGMAN
Counsel for Petitioner
Room 838
National Press Building
Washington 4, D. C.

Of Counsel:
C. LENOIR THOMPSON
Bay Minette, Alabama.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

Subject Index

PAGE

Prayer for Certiorari and Rehearing 1

Grounds for Prayer 2

A. Documents Missing from Record 2

B. New Questions as Basis for Rehearing 8

APPENDIX

1. Statute Cited 10

2. Affidavit of Petitioner of January, 1957 10

Table of Cases Cited

Ambler v. *Whipple*, (1875), 23 Wall. 278-283, 23 L.Ed. 127; (1951), 342 U.S. 33, 72 S.Ct. 10, 96 L.Ed. 46 7

Consolidated Edison Co. v. *National Labor Relations Board*, (1938), 305 U.S. 197, 234, 59 S.Ct. 206, 83 L.Ed. 126 9

Dixon v. *Duffy*, (1952), 343 U.S. 393, 72 S.Ct. 859, 96 L.Ed. 1026; (1951), 342 U.S. 33, 72 S.Ct. 10, 96 L.Ed. 46 7

Doremus v. *Board of Education*, (1952), 342 U.S. 429, 432, 72 S.Ct. 394, 96 L.Ed. 475 8

Erie R.R. v. *Purdy*, (1902), 185 U.S. 148, 152, 27 S.Ct. 405, 46 L. Ed. 847 8

Ex Parte v. *Uppercu*, (1915), 239 U.S. 435, 440, 441, 36 S.Ct. 140, 60 L. Ed. 368 6

Givens, Rose E., Administratrix, et al. v. *C. A. Moulton*, (1956), 87 So. 2d 839 ..... 1, 2, 4, 5

Goodenough Horseshoe Mfg. Co. v. *Rhode Island Horseshoe Co.*, (1877), 154 U.S. 635, 636, 14 S.Ct. 1180, 24 L.Ed. 368 ..... 6, 7

Hansberry v. *Lee* (1940), 311 U.S. 32, 41, 61 S.Ct. 115, 85 L.Ed. 22 4

PAGE

Lovell v. *Griffin,* (1938), 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949 8

Norton Co. v. *Department of Revenue of State of Illinois,* (1951), 340 U.S. 534, 538, 71 S.Ct. 377, 95 L.Ed. 517 7

Palmer v. *Ashe,* (1951), 342 U.S. 134, 137, 138, 72 S.Ct. 191, 96 L.Ed. 154 5

Rice v. *Sioux City Cemetary,* (1954), 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897, 348 U.S. 880, 75 S.Ct. 122, 99 L.Ed. 693 8

Seaboard Airline R.R. Co. v. *Daniel,* (1948), 333 U.S. 118, 122, 68 S.Ct. 426, 926 L.Ed. 580 5

Taylor v. *Alabama,* (1948), 335 U.S. 252, 254, 68 S.Ct. 1415, 92 L.Ed. 1935 9

U. S. v. *Western Pacific R. R. Co.* (1956), 352 U.S. ——, 77 S.Ct. U.S. ——, 1 L.Ed. 2d. 126, 131 5

Wiggins Estate Co. v. *Jeffery, et al.,* (1944), 19 So. 2d. 769, 246 Ala. 183 ..... 1, 2, 3, 4, 5, 8

Table of Statutes Cited

Code of Alabama, July 2, 1940, as amended, Title 7, sec. 754 10

Supreme Court of the United States

October Term, 1956

No. 562

CHARLES A. GIVENS
Petitioner

v.

C. A. MOULTON

PETITION FOR WRITS OF CERTIORARI TO OBTAIN DOCUMENTS MISSING FROM RECORD IN ABOVE CAUSE AND PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles A. Givens, prays that writs of certiorari issue from this Court to the Supreme Court of Alabama and to the Circuit Court of Escambia County, Alabama to certify to this Court the entire record in the case of *Wiggins Estate Co.* v. *Jeffery, et al.*, (1944), 19 So. 2d. 769, 246 Ala. 183, and to the Circuit Court of Escambia County in chancery for documents not included in the record of *Rose E. Givens, Administratrix, et al.*, v. *C. A. Moulton*, (1956), 87 So. 2d 839, as follows:

1. Amended cross bills of June 19, 1951 and August 29, 1951 with any and all exhibits attached thereto, filed in said Circuit Court in the *Rose E. Givens* case by Gerald S. Givens, a defendant therein,

2. Order of recusal of Trial Judge Page when he was charged by petitioner and other defendants with an interest in the outcome of the proceedings in the Rose E. Givens proceedings.

3. Any and all other documents in said case now in the custody of said Circuit Court and not heretofore certified to this Court.

Petitioner further prays for a rehearing after the certification of the above documents missing from the record in this cause on two Federal questions not heretofore presented in the petition filed in this Court on November 10, 1956 and reargument on the two questions presented in said petition of November 10, 1956.

GROUNDS FOR PRAYER

In accordance with Rule 58(2), petitioner submits as grounds for issuance of the above writs of certiorari

1. Prior to November 10, 1956, the last day on which the petition in this cause could be filed, *and after that date*, the State courts below failed or refused to certify the above missing documents to this Court, which failure or refusal greatly hampered preparation of the petition of November 10, 1956 and prevented petitioner from presenting a full and fair statement of his case.

2. Petitioner desires to present two additional federal questions which were not presented in the petition of November 10, 1956.

A. Documents Missing from Record.

The Supreme Court of Alabama affirmed in the *Wiggins Company case* (Pet. 27-47) foreclosure and deficiency judgment decrees of the Circuit Court of Escambia County in chancery, settling title in respondent Moulton

in certain property owned by petitioner and other defendants below. In the instant case below in the circuit court brought by respondent Moulton to quiet title, petitioner and other defendants below filed cross-bills and exhibits attached thereto, alleging extrinsic and instrinsic fraud on the part of Moulton and others, in securing said foreclosure and deficiency decrees, prayed they be set aside and that title be settled in petitioner et al. (Pet. 7, 18-20). These pleadings were stricken on demurrer based on res adjudicata of the judgments in the *Wiggins Company case.* (Pet. 11, 12, 19). The Supreme Court of Alabama affirmed in the *Rose E. Givens* case on appeal these actions of the Circuit Court of Escambia County (Pet. 52-62).

Petitioner by affidavits to this Court has shown that he made every reasonable effort to get the Register of the Escambia County Court in chancery to certify up the record * in the *Wiggins Company* case before filing the petition of November 10, 1956 (Pet. 3, 4, 6, 9-18, 68, 71-73). In that petition, petitioner stated.

". . . a proper transcript cannot be made from said record by the Clerk of said Court as a part of the transcript of record and certified through the Supreme Court of Alabama by November 10, 1956." (Pet. 68)

Petitioner thereupon included in his affidavit a copy of a bill of review and exhibits attached thereto filed in the *Wiggins Company* case

> "*in lieu of said record until the said Register in Chancery of Escambia County, Alabama, can prepare a proper transcript of the said record and furnish a properly certified copy thereof to the Supreme Court of Alabama for certification to the Supreme Court of the United States.*" (Pet. 71, italics by petitioner).

---

* Petitioner has since ascertained that part of this record is in the Supreme Court of Alabama.

Petitioner was not a party to the proceedings in said bill of review in the *Wiggins Company* case (Pet. 76-78). Said bill of review is only a small part of said *Wiggins Company* case. This document was the only one petitioner could obtain by November 10, 1956 from sources outside the Alabama Courts.

The complete record in the *Wiggins* case is essential for a proper determination by this Court whether a federal question exists, which petitioner raised in petition of November 10, 1956, namely whether the Circuit Court of Escambia County never had personal jurisdiction over petitioner in the *Wiggins Company* proceedings and whether, therefore, the judgment in that case was res adjudicata in the *Rose E. Givens* case, (Pet. 4) and if not, whether the application of said doctrine to petitioner by the State Courts below in the instant case, violated the due process clause of the 14th Amendment.

Petitioner asks that this federal question presented in the petition of November 10, 1956 be reheard on certification of the *Wiggins Company* record because this Court could not and now cannot proceed properly without the full record before it. That record is within the purview of this Court on the federal question of jurisdiction noted above (Pet. 16).

The question of service of process in the *Wiggins* case and the enforcement of the judgment thereof is itself a federal question under the 14th Amendment. In *Hansberry* v. *Lee* (1940) 311 U.S. 32, 41, 61 S. Ct. 115, 85 L. Ed. 22 this Court held that where a person has not been made a party to a suit by proper service of process

> ". . . Judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require."

Jurisdiction can be raised on petition for writ of certiorari to this Court even if it were not raised below. *U. S.* v. *Western Pacific R. R. Co.*, (1956), 352 U. S. —, 77, S.Ct. —, 1 L.Ed. 2d. 126, 131; *Seaboard Air Line R. R. Co.* v. *Daniel*, (1948), 333 U.S. 118, 122, 68 S.Ct. 426, 92 L.Ed. 580. Petitioner can offer (as he did, Pet. 71-73) by affidavit outside the record before this Court evidence to show he had no counsel in the *Wiggins Company* proceedings, *Palmer* v. *Ashe*, (1951), 342 U.S. 134, 137, 138, 72 S.Ct. 191, 96 L.Ed. 154.

With respect to the pleadings and exhibits missing from the record of the *Rose E. Givens* proceedings, petitioner did not commit laches and was not negligent. He made timely applications on two different occasions before final judgment was entered by the Supreme Court of Alabama for these documents and after entry of final judgment of that Court, by writ of error coram nobis which was dismissed by that Court. (Pet. 4, 5, 7, 8, 22-26, 66-67). Such failure to certify these documents by November 10, 1956, was the fault of the Circuit Court of Escambia County, Alabama. (Pet. 4, 7, 8, 22-24, 66, 67).

Petitioner in the petition of November 10, 1956 stated that these missing pleadings have "greatly handicapped the petitioner in the preparation of the case because of the incomplete transcript." (Pet. 24).

When it was evident that the certification of the missing documents would not be made by November 10, 1956, counsel for petitioner discussed the situation with staff members of the Clerk's office of this Court. They suggested to counsel that, if said missing documents were certified before Court action on the petition, a motion to file a supplemental brief could be entered with this Court.

Petitioner and his counsel in Alabama made a number of efforts after November 10, 1956 to have all of the

missing documents certified to this Court. The clerk of the Circuit Court of Escambia County stated to them he had no time to prepare and certify the missing documents. When petitioner offered to take them to a room on the same floor in the Courthouse for reproduction, said clerk informed him he would not certify such reproductions to this Court. (infra, pp. 10-11) Petitioner, therefore, could not file by January 14, 1957 (the date of denial of the petition) a motion for leave to file a supplemental record and brief.

Petitioner submits that the decisions of this Court entitle him to the writ of certiorari for certification of the missing documents and for a rehearing on the petition of November 10, 1956.

1. Petitioner has a right to have the records produced and certified to this Court. In *Ex Parte Upperco*, (1915), 239 U.S. 435, 440, 441, 36 S.Ct. 140, 60 L.Ed. 368, this Court stated

> "It appears from what we have said that there are documents present within the jurisdiction that furnish evidence material to the petitioner's case. The general principle is that he has a right to have them produced. It does not matter whether they have been used in the original case or not, or to whom they belong . . . . The necessities of litigation and the requirement of justice found a new right of a wholly different kind. . . . the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, ..." (a Court order sealing the records of the original case—note supplied by petitioner).

2. This Court has authority to issue a writ of certiorari to the Supreme Court of Alabama and to the Circuit Court of Escambia County in chancery for these records. In *Goodenough Horseshoe Mfg. Co.* v. *Rhode Island Horseshoe Co.*, (1877), 154 U.S. 635, 636, 14 S.Ct. 1180, 24 L.Ed. 368, this Court held

"If parts of the record below are omitted in the transcript, we may by certiorari have the omissions supplied. . . ."

This Court, *in effect*, has granted certiorari to complete the record. *Dixon* v. *Duffy*, (1952), 343 U.S. 393, 72 S.Ct. 859, 96 L.Ed. 1026; (1951), 342 U.S. 33, 72 S.Ct. 10, 96 L.Ed. 46.

3. Until these omissions from the record are supplied, this Court cannot proceed, and the denial of the petition on January 14, 1957 is for naught. *Goodenough Horseshoe Mfg. Co. op. cit.*

4. Since there are vital omissions from the record of this case and there has been no laches or negligence on the part of the petitioner, this Court should grant a rehearing on the whole record. In *Ambler* v. *Whipple*, (1875), 23 Wall 278-283, 23 L.Ed. 127, this Court ruled

". . . the hearing in this court was had on an imperfect record, that a large part of the matter which was before the court below having been omitted in the transcript certified to this court, and it attempts to show by affidavits . . . that there was no laches or neglect for which the appellee should be held responsible for failing to examine and perfect the record before the hearing. . . .

If the statement be correct, and if the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument; . . . . ."

The issue of court jurisdiction over petitioner in the *Wiggins Company* case and the issue of fraud are vital Federal questions and the entire record of that case must be examined by this Court. In *Norton Co.* v. *Department of Revenue of State of Illinois*, (1951), 340 U.S. 534, 538, 71 S.Ct. 377, 95 L.Ed. 517, this Court said

"Of course, in constitutional cases we have power to examine the whole record to arrive at an inde-

pendent judgment as to whether constitutional rights have been invaded."

This is especially true as to the standing of the parties, *Doremus* v. *Board of Education of Hawthorne*, (1952), 342 U.S. 429, 432, 72 S. Ct. 394, 96 L.Ed. 975.

B. New Questions as Basis for Rehearing

1. Petitioner desires to present a federal issue not heretofore referred to in the petition of November 10, 1956. By the application by the state courts below, petitioner and other defendants were prevented from raising a personal defense of extrinsic and intrinsic fraud on the *Wiggins Company* case judgment, which by law in Alabama and elsewhere they had a right to do, thus denying them due process under the Fourteenth Amendment (Pet. 20-21). These missing records in the instant case (supra, 1) show with particularity such fraud and such missing records were not before the Supreme Court of Alabama on the appeal in the instant case and not before this Court.

2. Petitioner desires to raise on rehearing the following question which was also not heretofore presented in the petition of November 10, 1956:

Whether the Federal questions presented in the petition and the new issue presented above were adequately presented and decided below.

This in itself is a Federal question, *Lovell* v. *Griffin*, (1938), 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949; *Erie R. R.* v. *Purdy*, (1902), 185 U.S. 148, 152, 27 S.Ct. 405 46 L.Ed. 847.

3. The proceedings on the writ of coram nobis relative to the missing records (Pet. 2, 3, 4, 5, 8, 22-26) are of sufficient public importance and concern to call for review by this Court. *Rice* v. *Sioux City Cemetary*, (1954), 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897, 348 U.S. 880, 75 S.Ct. 122, 99 L.Ed. 693. The ques-

tion of due process applies to proceedings on appellate review, *Consolidated Edison Co.* v. *National Labor Relations Board,* (1938), 305 U.S. 197, 234, 59 S.Ct. 206, 83 L.Ed. 126, and on writs of coram nobis, *Taylor* v. *Alabama,* (1948), 335 U.S. 252, 254, 68 S.Ct. 1415, 92 L.Ed. 1935.

In Alabama, appeal from a lower State court of equity is a matter of right (Infra 10). If the decision of the Supreme Court of Alabama is allowed to stand without review by this Court, then the highest court of every State in which appeal to it is a matter of right by law can decide a case on appeal on an empty record where documents vital to the determination of the issues of the case are retained in the lower state court and are never before the highest state court on appeal through fault or negligence of said lower state Court. This is not justice or fair play as contemplated by the Fourteenth Amendment. *This issue has never been decided by this Court.*

Respectfully submitted,

CHARLES BRAGMAN
Counsel for Petitioner

CERTIFICATE OF GOOD FAITH

I, Charles Bragman, counsel for Petitioner, do hereby certify that this petition is presented in good faith and not for purposes of delay and is restricted to the grounds specified in rule 58 para. 2 of the Rules of this Court.

CHARLES BRAGMAN
Counsel for Petitioner

APPENDIX

1. The Code of Alabama, July 2, 1940, as amended, Title 7 sec. 754

> ". . . *Appeals to supreme court on all final judgments.*—From any final judgment or decree of the circuit court, or courts of like jurisdiction, or probate court, except in such cases are otherwise directed by law, an appeal lies to the supreme court, for the examination thereof as matter of right . . . ."

2.

IN THE
SUPREME COURT OF THE UNITED STATES

ROSE E. GIVENS, et als,
APPELLANT
v.
C. A. MOULTON
APPELLEE

To the Honorable the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Comes your Petitioner Charles A. Givens and as further grounds for a rehearing by this Honorable Court on the petition filed by him for a Writ of Certiorari to the Supreme Court of Alabama shows unto this Honorable Court as follows:

That the Register in Chancery of the 21st Judicial Circuit Escambia County, Alabama had in his possession certain pleadings and attached exhibits which your Petitioner endeavored to have properly transcribed on transcript paper and that your Petitioner called upon and requested of the said Register in Chancery that the said pleadings and exhibits which were a part of the cause, Givens v. Moulton et al now before this Honorable Court

be properly transcribed as noted: that part of the Wiggins Estate Company v. Jeffrey file is in the Supreme Court of Alabama and part of said file is presently in the office of the said Register in Chancery at Browton, Alabama, and that your Petitioners' request that all of said files be copied on proper transcript paper was refused on the grounds that the said Register in Chancery did not have time to properly transcribe said pleadings and exhibits within the time permitted your Petitioner whereby the said pleadings and exhibits might have been incorporated in the original petition to this Honorable Court.

AND further that your Petitioner sought and requested of the said Register in Chancery permission to have the said documents removed to the adjoining office in the Court House of Escambia County into the custody of the Judge of Probate, a former Register in Chancery for the purpose of having said records photostated and the said Register in Chancery then and there stated that he did not certify any copies of the said records if the copies were reproduced elsewhere than in his office. All of this despite the fact that the office of the Register in Chancery and the office of the Judge of Probate are adjoining offices occupying the entire side of the Court House.

Your Petitioner sought and requested of the said Register in Chancery both prior and subsequent to November 10, 1956. The aforesaid documents in both causes referred to above and that the said Register in Chancery failed to submit the documents prior and subsequent to November 10, 1956 and that your Petitioner is still unable to obtain.

It will further be noted that beginning on page 65-6 and 71 and 73, of the original petition in this cause, there are sworn certificates that the documents mentioned in this present affidavit are available and are necessary to a

proper adjudication of this cause together with records in the Wiggins Estate Company v. Jeffery.

CHARLES A. GIVENS

STATE OF ALABAMA
BALDWIN COUNTY

Before me the undersigned authority personally appeared Charles A. Givens who being duly sworn, deposes and says:

That the facts stated in the foregoing affidavit are true and correct to the best of his knowledge, information and belief.

CHARLES A. GIVENS

Sworn to and subscribed before me this the 28 day of January, 1957.

RANDOLPH McGOWAN, JR.